



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

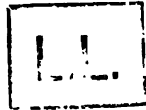
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

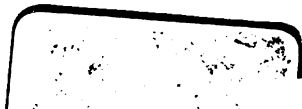
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



U.S.A.

Ga-100

38



499
REPORTS

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

FROM

November Term, 1859, at Milledgeville, to
June Term, 1860, at Macon, inclusive.

VOLUME XXX.

No. _____

B. Y. MARTIN, Law School
REPORTER.

OF THE

CINCINNATI COLLEGE.

Atlanta, Georgia:
FRANKLIN PRINTING HOUSE.
WOOD, HANLEITER, RICE & CO.

1862.



ENTERED, according to the Act of Congress, in the year 1882, by
JOHN J. MARTIN, as Executor of BENJAMIN Y. MARTIN, deceased,
in the Clerk's Office of the District Court for the Northern District of Georgia.

JUDGES OF THE SUPREME COURT.

HON. JOSEPH H. LUMPKIN, ATHENS.

HON. LINTON STEPHENS, SPARTA.

HON. RICHARD F. LYON, ATLANTA.

BENJAMIN Y. MARTIN, Reporter, COLUMBUS.

C. W. DuBOSE, Clerk, SPARTA.

JUDGES OF THE SUPERIOR COURTS, RESIDING DURING THE PERIOD OF THESE REPORTS.

the Ridge Circuit,	Hon. GEORGE D. RICE, Marietta.
unswick Circuit,	Hon. W. M. SESSIONS, Holmesville.
attahoochee Circuit,	Hon. E. H. WORRILL, Talbotton.
erokee Circuit,	{ Hon. L. W. CROOK, Dalton. Hon. D. A. WALKER, Dalton.
weta Circuit,	Hon. O. A. BULL, LaGrange.
tern Circuit,	Hon. W. B. FLEMING, Savannah.
nt Circuit,	Hon. E. G. CABANESS, Forsyth.
eon Circuit,	Hon. H. G. LAMAR, Macon.
idle Circuit,	Hon. W. W. HOLT, Augusta.
thern Circuit,	Hon. T. W. THOMAS, Elberton.
oulgee Circuit,	{ Hon. R. V. HARDEMAN, Clinton. Hon. I. L. HARRIS, Milledgeville.
aula Circuit,	{ Hon. W. C. PERKINS, Cuthbert. Hon. D. L. KIDDO, Cuthbert.
thern Circuit,	Hon. A. H. HANSELL, Thomasville.
th-Western Circuit,	Hon. A. A. ALLEN, Bainbridge.
poosa Circuit,	Hon. D. F. HAMMOND, Newnan.
rn Circuit,	Hon. N. L. HUTCHINS, Lawrenceville.

TABLE OF CASES REPORTED IN THIS VOLUME, ALPHABETICALLY ARRANGED.

A

Adair <i>et al.</i> vs. Adair.....	102
Adams & Carroll vs. Keeler <i>et al.</i>	86
Allen vs. Hardee <i>et al.</i>	463
Andrews; Bonner <i>et al.</i> vs.,.....	297
Applewhite vs. Baldwin <i>et al.</i>	915
Argrove and Wife <i>et al.</i> ; Lowe vs.	129
Arnold; Jarrett <i>et al.</i> vs.....	323
Arnold; Mayor and Council of Columbus vs.....	517
Askew vs. Dupree.....	173
Averitt, Adm'r. vs. Pope, Adm'r..	660

B

Baker vs. Shephard <i>et al.</i>	706
Baldwin <i>et al.</i> ; Applewhite vs....	915
Baldwin; Johnson vs.....	816
Ball vs. Duncan.....	938
Baldwin vs. Walden.....	829
Bancroft & Chamberlain; Stone vs.	860
Bank of Brunswick; Water Lot Company vs.....	685
Bank of Augusta <i>et al.</i> ; Kirkpatrick vs.....	465
Barksdale; Weathers vs.....	688
Bass <i>et al.</i> vs. Mayor and Council of Columbus.....	845
Bell <i>et al.</i> vs. Rawson <i>et al.</i>	712
Bell; Smith vs.....	919
Bell; Brawner vs.....	334
Bennett vs. Odum.....	940
Benson vs. Griffin.....	106
Betha <i>et al.</i> ; Green vs.....	896
Bethune vs. Dougherty.....	770
Bigelow vs. Young.....	121
Black; Barton vs.....	638
Black vs. Lewis <i>et al.</i>	958
Black <i>et al.</i> vs. Thornton.....	361
Bohannon vs. Jones.....	488
Bonner <i>et al.</i> vs. Andrews.....	287
Bostick vs. Hardy.....	834

Boswell; Maddox vs.....	38
Bookout, W. N. and W.; Neal vs.	40
Boynton; Roberts vs.....	939
Brady vs. McKee & Roberts....	748
Brawner vs. Bell.....	334
Bradford <i>et al.</i> ; Brown vs.....	927
Brewster; Worthan vs.....	112
Brewton <i>et al.</i> vs. Brewton <i>et al.</i> ..	416
Broadfield <i>et al.</i> ; Trustees of Monroe University vs.....	1
Brown vs. McCrary.....	578
Brown vs. Ricks.....	777
Brown; Clayton vs.....	490
Brown vs. Bradford <i>et al.</i>	927
Brown & Carmichael; Way and Taylor vs.....	806
Brown & Carmichael; Cook and Thompson vs.....	925
Brown & Brown; Cheever vs....	904
Bryan vs. Walton.....	834
Bryant, Adm'r.; Lowe vs.....	528
Buckner vs. Chambliss.....	652
Burch vs. Ward.....	140
Burton vs. Black.....	638
Busby <i>et al.</i> ; Cain vs.....	714
Bussey and Ferrer; Clayton vs..	946
Butler; Renew vs.....	954

C

Cain vs. Busby <i>et al.</i>	714
Camp vs. Mattheson & O'Harra <i>et al.</i>	170
Campbell; Stephenson vs.....	159
Candler; Hammond vs.....	275
Carswell vs. Ware <i>et al.</i>	267
Carter vs. Davis.....	650
Carter <i>et al.</i> vs. Christie.....	813
Carhart, Bro's & Co.; Mason, Dickinson & Co. vs.....	917
Cash <i>et al.</i> vs. Williams.....	20
Castleberry vs. Weaver.....	534

TABLE OF CASES.

vi

H

Hall; Oglesby and Wife vs.....	386
Hamilton <i>et al.</i> ; Wade and Co. vs	450
Hamilton; Williams vs.....	968
Hammond vs. Candler.....	275
Hardee vs. Williams and Apple-	
white.....	921
Hardy; Bostick vs.....	836
Hardee <i>et al.</i> ; Allen vs.....	463
Hargroves, Ex'r, vs. Chambers <i>et</i>	
<i>al.</i>	580
Harwell vs. Lively <i>et al.</i>	315
Hawkins; Chappell, Trustee, vs.	756
Hawkins vs. King.....	969
Hays; Pope vs.....	539
Henderson; Lulburrow vs.....	452
Herring <i>et al.</i> vs. Rogers <i>et al.</i> ...	615
Hertzfeld, Dempsey vs.....	806
Hightower vs. Goodwyn.....	249
Hobbs vs. Davis.....	423
Holman; Durham vs.....	619
Holman; Spence vs.....	646
Hope <i>et al.</i> vs. Moore and Philpot	465
Hope <i>et al.</i> ; Newby vs.....	465
Hope <i>et al.</i> ; White <i>et al.</i> vs.....	465
Hook vs. Stovall, Duan and Co..	418
Moore; McDaniel, Adm'r. vs.....	981
Hewes, Hyatt and Co.; Strozier vs	578
Howard <i>et al.</i> vs. Marine Bank	
<i>et al.</i>	841
Howard; Ketchum vs.....	931
Hull <i>et al.</i> ; Cleckley vs.....	838
Hull vs. Tommy.....	762
Hunter vs. Robertson and Robert-	
son.....	479
Hurt; Union Dray Line Co. vs...	798

I

Iagrum vs. Mitchell.....	547
--------------------------	-----

J

Jackson and Brothers vs. Mowry	143
Jackson; Sharman vs.....	224
Jackson; Sorrell vs.....	901
Jones vs. Tomlinson.....	540
Jaques <i>et al.</i> ; City Council of Co-	
lumbus vs.....	506
Jarrett vs. Arnold.....	323
Jeffers and Cochrane; Wilkinson	
vs.....	153
Jenkins; Willis <i>et al.</i> vs.....	187
Jenkins and Bekt; Foster vs.....	476
Johnson vs. Baldwin.....	816
Johnson, <i>alias</i> Thompson, vs. The	
State.....	426
Johnson vs. Johnson.....	857
Johnson vs. Gorman.....	612
Jones vs. Robson.....	826

Jones <i>et al.</i> vs. Kerr and Hope...	98
Jones; Roberson vs.....	486
Jones and Brooks; Mustian vs...	961
Jones; Matthewson <i>et al.</i> vs.....	806
Jones vs. Wills Valley Railroad	
Company.....	43
Jones; Water Lot Company vs.	944

K

Keaton <i>et al.</i> ; Durham vs.....	800
Keeler <i>et al.</i> ; Adams & Carroll vs.	56
Kendrick and Co.; Lindsay vs...	545
Kerr and Hope; Jones <i>et al.</i> vs..	93
Kervin vs. Walker.....	906
Kelly and Wife <i>et al.</i> ; Hawthorn	
<i>et al.</i> vs.....	965
Ketchens vs. Howard.....	931
Klink, Adm'r, vs. Steamer Curseta	
etc.....	504
King; Hawkins vs.....	909
King vs. Mitchell.....	164
Kirkpatrick vs. Bank of Augusta	
<i>et al.</i>	465
Kirksey vs. Kirksey.....	156
Kitchand <i>et al.</i> vs. Davis.....	686
Knapp; Moises vs.....	942

L

Lawless; Findley vs.....	66
Leonard vs. Peeple.....	61
Leonard; Water Lot Company vs	560
Lesterjelle vs. City Council of Co-	
lumbus.....	936
Lester; Macon & Western Rail-	
road Company vs.....	911
Lewis <i>et al.</i> ; Black vs.....	956
Lieber <i>et al.</i> ; Ryan vs.....	433
Lindsay vs. Kendrick and Co....	545
Lively <i>et al.</i> ; Harwell vs.....	315
Love; Gilliam and Berry vs....	664
Lowe vs. Bryant.....	528
Low vs. Argrove and Wife <i>et al.</i>	129
Lucas <i>et al.</i> vs. Lucas.....	191

M

Macon & Western Railroad Com-	
pany vs. Lester.....	911
Maddox vs. Boswell.....	38
Maitland, Kennedy and Co.; Mc-	
Dougald vs.....	703
Malone <i>et al.</i> ; Wooding vs.....	979
Mann vs. Waters.....	207
Mann vs. Waters.....	220
Mangin <i>et al.</i> ; Stanford vs.....	353
Marine Bank <i>et al.</i> ; Howard <i>et al.</i>	
vs.....	841
Mariner <i>et al.</i> ; Rodgers vs.....	515

TABLE OF CASES.

IX

Robinson <i>et al.</i> vs. Towns, Governor, etc.....	818
Robinson vs. Thomson and Co....	933
Rodgers vs. Rushin.....	934
Roe and Hays vs. Doe, <i>ex dem.</i> Morrison.....	971
Roe and Roberts; Doe, <i>ex dem.</i> Shefall <i>et al.</i> vs.....	458
Roe and Tidd vs. Doe, <i>ex dem.</i> Pierce.....	873
Roe <i>et al.</i> ; Doe, <i>ex dem.</i> Hooper <i>et al.</i> vs.....	553
Roe and Riley vs. Doe, <i>ex dem.</i> Adams <i>et al.</i>	608
Roe and Calhoun vs. Doe, <i>ex dem.</i> Johnson <i>et al.</i>	611
Roe and Brooking; Doe, <i>ex dem.</i> Dearmond <i>et al.</i> vs.....	632
Roe and Hay, Adm'r, vs. Doe, <i>ex dem.</i> Ayers <i>et al.</i>	775
Rogers vs. Mariner <i>et al.</i>	515
Rogers <i>et al.</i> ; Herring <i>et al.</i> vs....	615
Ross vs. Davis <i>et al.</i>	823
Rowe vs. Ware.....	278
Rowell <i>et al.</i> ; Grace <i>et al.</i> vs....	764
Rowland and Anseley, Mountain vs	929
Rowell; Shotwell vs.....	557
Rucker; Fox vs.....	525
Russell; Slayton vs.....	127
Rutledge vs. Montgomery <i>et al.</i> ...	899
Rutherford vs. Newson.....	728
Ryan vs. Lieber <i>et al.</i>	433

S

Sanders vs. The Town Commissioners, etc.....	679
Scott <i>et al.</i> vs. Winship <i>et al.</i>	879
Scott, Trustee, vs. Turpin and Volker.....	964
Seymour, Fanning and Co.; Molyneux vs.....	440
Sharman vs. Jackson.....	234
Shebee; Gaulden vs.....	948
Sheldens <i>et al.</i> ; McCauley vs....	832
Shephard <i>et al.</i> ; Baker vs.....	706
Shine vs. Redwine and Wife....	780
Shirley vs. Price <i>et al.</i>	325
Shippard and Chambliss; Wall <i>et al.</i> vs.....	923
Shotwell vs. Rowell.....	557
Schultz <i>et al.</i> vs. Watkins <i>et al.</i> ...	652
Skotoc; Griffin vs.....	300
Slayton vs. Russell.....	127
Smith vs. Bell.....	919
Smith <i>et al.</i> ; Chastain vs.....	96
Smith; Davis vs.....	263
Smith and Wife vs. Overby.....	241
Setling; Easter vs.....	503
Sorrell vs. Jackson.....	901

Speer vs. Atlanta and West-Point Railroad.....	135
Spence vs. Holman.....	646
Spicer vs. Yopp <i>et al.</i>	285
Sprayberry vs. Merks.....	91
Springer <i>et al.</i> vs. Congleton....	876
Staley vs. Matheny.....	937
Stanford vs. Mangin <i>et al.</i>	355
Steamer Cusseta; Klink, Adm'r, vs	504
Stephenson vs. Campbell.....	159
Stewart and Fountain; McDuffie vs.....	661
Stewart; Williams vs.....	210
Stone <i>et al.</i> vs. Green <i>et al.</i>	340
Stone vs. Bancroft and Chamberlain.....	860
Stovall, Dunn and Co.; Hooks vs	418
Stovall <i>et al.</i> ; Dunning and Tuttle vs.....	444
Strozier vs. Howes, Hyatt and Co.	578
Sutton; Cherry and Walker vs..	875

T

Tennell, Adm'r, vs. Ford <i>et al.</i> ...	707
The Justices, etc.; Frith vs.....	723
The City Council of Rome vs. Perkins.....	154
The State; Fundy vs.....	400
The State; Gann vs.....	267
The State; Johnson, <i>alias</i> Thompson, vs.....	426
The State; McElvin vs.....	569
The State; McDaniel, <i>alias</i> Hickkey, vs.....	853
The State; Pinckard vs.....	757
The State; Prince and Stafford vs	27
The State; Whitworth vs.....	10
The State; Wright vs.....	325
The State; Dickens vs.....	383
The State; Milner vs.....	137
Thornton; Black <i>et al.</i> vs.....	361
Thompson and Co.; Robinson vs.	933
Thrower; Pitts vs.....	212
Tomlinson; Jones vs.....	540
Tommy; Hull vs.....	762
Tompkins vs. Female College....	455
Town Commissioners of Butler; Sanders vs.....	679
Towns, Governor etc.; Robinson <i>et al.</i> vs.....	818
Townsend, Crane and Co.; Glover vs.....	90
Troup <i>et al.</i> ; Forman <i>et al.</i> vs....	496
Trustees of Monroe University vs	1
Broadfield <i>et al.</i>	446
Tweedy vs. Urquhart.....	446

U

Union Dray Line Co. vs. Hurt...	798
Urquhart; Tweedy vs.....	446

V

Vineburgh; Myrick vs.....	161
Vanduzer vs. Christian.....	336

W

Wade and Co. vs. Hamilton <i>et al.</i>	450
Walden; Baldwin vs.....	829
Walden vs. McDonald.....	542
Walker; Cook vs.....	519
Walker <i>et al.</i> vs. Floyd.....	237
Walker; Kervin vs.....	906
Walton; Bryan vs.....	834
Wall <i>et al.</i> vs. Shippard and Chambliss.....	923
Ward; Burch vs.....	140
Ware; Rowe vs.....	278
Ware <i>et al.</i> ; Carswell vs.....	267
Ware vs. Craven.....	35
Warmock <i>et al.</i> ; Wiley vs.....	701
Water Lot Company vs. Leonard	560
Water Lot Company vs. Bank of Brunswick.....	685
Waters vs. McNabb <i>et al.</i>	672
Waters; Doeblor vs.....	344
Waters; Mann vs.....	207
Waters; Mann vs.....	220
Water Lot Company vs. Jones.....	944
Watson; Wright vs.....	648
Watkins <i>et al.</i> ; Schultz <i>et al.</i> vs..	682
Way and Taylor vs. Brown and Carmichael.....	806

Weathers vs. Barksdale.....	888
Weaver; Castleberry vs.....	534
Webster and Palmes; Price vs...	802
Webb vs. Fleming.....	808
Western and Atlantic Railroad; Mitchell vs.....	22
White <i>et al.</i> ; Womack <i>et al.</i> vs...	696
White <i>et al.</i> vs. Hope <i>et al.</i>	465
Whitworth vs. The State.....	10
Wiley vs. Warmock <i>et al.</i>	701
Wilkinson vs. Gill.....	760
Wilkinson vs. Jeffers and Cothrans	153
Williams <i>et al.</i> ; Ennis <i>et al.</i> vs..	691
Williams vs. Stewart.....	210
Williams vs. Fambro.....	232
Williams; Cash <i>et al.</i> vs.....	20
Williams and Applewhite; Hardeo vs.....	921
Willis <i>et al.</i> vs. Jenkins.....	167
Willis Valley R. R. Co.; Jones vs.	43
Winship <i>et al.</i> ; Scott <i>et al.</i> vs...	879
Womack <i>et al.</i> vs. White <i>et al.</i> ...	696
Wood; Cook vs.....	891
Wooding vs. Malone <i>et al.</i>	979
Woodruff vs. McGehee.....	158
Worthen vs. Brewster.....	112
Wright vs. Watson.....	618
Wright vs. The State.....	325

Y

Yopp <i>et al.</i> ; Spicer vs.....	285
Young; Bigelow vs.....	121

PROCEEDINGS
AT
MACON, GEORGIA, JUNE TERM, 1860,
IN MEMORY
OF
HON. ABNER P. POWERS.

Judge NISBET, in behalf of the Committee appointed, presented the following report:

Judge ABNER P. POWERS was graduated, at an early age, from the University of Georgia. After completing his preliminary studies, he was admitted to the Bar, and settled in the city of Macon. The Bar at Macon, at that day, embraced a number of the most eminent men of the profession. In the face of active and able competition, he acquired, at first, a respectable practice, and finally attained to distinction. He represented the county of Bibb in the Legislature, and was twice elected to the Bench of this Circuit: first by the General Assembly, and afterwards by the people. He died when but little advanced beyond the prime of life. His success had been equal to that of the favored ones of his day. He had acquired fortune, friends, and the confidence of the public, and was the head of a large and amiable family. He left us at a time when the past yielded much for gratifying retrospection—when the present afforded the richest elements of happiness, and the future invited him to higher honors, and ampler resources of enjoyment.

All that he possessed, and all that he hoped for, could not stay the hand of the Great Destroyer. Silent, and sure, and remorse-

less, Death heeds neither youth nor age; genius, learning, poverty nor wealth; honor nor shame; the tears of relatives and friends, nor the cold indifference of strangers. All equally, the unwearied Reaper gathers to his ever filling, yet ever unfilled, garner—the tomb. Nature shrinks from the darkness of the grave, but Revelation pours into it her cheering light. In the midst of life we are in death, yet it is not all of life to live.

This Court and Bar have occasion to notice the frequent occurrence of these memorial scenes.

Lawyers are a short-lived class. Frequent and thick, like Autumn leaves, they wither and fall. The fallen leaf, even in its decay, enriches its parent earth; so we, in death, may contribute, by our virtues, to the wealth of our common humanity.

Judge POWERS was an amiable man. The law of love dwelt in his heart, and the milk of human kindness mingled with his blood. These things were manifested in his relations as husband, parent, and master. He was agreeable in his intercourse with the members of the Bar—fond of anecdote, and appreciating humor. Nature bestowed upon him a keen, analytical mind. Patience, courtesy, love of truth and justice, familiarity with the Law as a science, courage, and reverence for authority, are the properties of a good Judge.

All these he possessed in such degree as commanded respect for his administration. He had faults, else he had not been human. They were rather infirmities than vices, and, in the estimation of those who knew him best, almost leaned to virtue's side.

Resolved, That whilst we recognize, in the death of our brother, the hand of Him who doeth all things well, we deplore his loss, sympathize with his bereaved family, and will strive to emulate his virtues.

Resolved, That this report be entered on the Minutes of this Court, and that the Clerk furnish a copy to his family.

Mr. Justice LUMPKIN responded to the report, as follows:

Well has it been said, my friends, that life is a fountain, fed by a thousand streams that perish, if one be dried. It is a silver cord,

twisted by a thousand strings, that parts asunder, if one be broken. Frail and thoughtless mortals are surrounded by innumerable dangers, which make it much more strange that they escape so long, than that so many perish so suddenly at last. We are encompassed with accidents, ever ready to crush the mouldering tenement that we inhabit. The seeds of disease are planted in our constitution by the hand of Nature. The earth and the atmosphere whence we draw our life are impregnated with death.

Health is made to operate its own destruction. The soul, that animates the body by a vivifying fire, tends to wear it out by its own action. Death lurks in ambush about all our paths.

The just and eloquent tribute which you have paid to the memory of Judge POWERS, renders it unnecessary that I should occupy much of your time upon this occasion.

He belonged to that class of lawyers, who rely more upon their clear perceptions of what is just and true, than upon books and cases—more upon principle than precedents. *Juvat accedere fontes.*

His mind was preëminently practical, and his oratory was in admirable keeping with his strong natural sense. He invariably spoke for use, and never for display.

Judge POWERS was of a most kindly disposition. Had he lived in the degenerate days of the Stuarts, no temptation of power or place could have converted him into the cruel and remorseless tyrant Jeffries, of whom it has been said, that "so he rode on horseback, he cared not over whom he rode."

His manners were the most bland and agreeable; and this, added to the intuitive quickness of his mind, exuberant and good temper, made him the favorite he was, with his brethren and the public.

I regret that our lamented friend had not lived in the merrier days of the Law, when more latitude was allowed than is considered, at this prime age, consistent with good taste. As late as "Burroe's Reports," we find legal "truths severe," dressed in the fairy garb of verse. The last case of this sort is that of the Parish of Shadwell against the Parish of St. Johns, Mopping. The judgment runs thus:

Proceedings in Memory of Hon. Abner P. Powers.

"A woman having a settlement,
Married a man with none:
The question is, he being dead,
If that she had is gone?"

"Quoth, Sir John Pratt, her settlement
Suspended did remain
Living the husband; but him dead,
It doth revive again."

Chorus of Puisse Judges:

"Living the husband; but him dead,
It doth revive again."

As late as the days of Lord Mansfield, it was not esteemed as unfitting the dignity of the Court to indulge in pleasantry. Sir Fletcher Norton, in addressing the Bench on some question of Manorial rights, happened to say: "I can instance the point in our own person, my Lord, for I have myself two little Manors." When the old chief, interrupting him with one of his blandest smiles, observed, "We are well aware of that, Sir Fletcher."

How the deceased would have enjoyed such diversions! And how much more he would have been appreciated, than in these latter days of stilts, and starch, and pretension!

But he is gone from amongst us; his tall and manly form is laid low in the dust; his warm and sympathetic heart will beat no more; his bright and beaming eye will be lit up no more by the fire of his genius. Living, we all loved him; dead, we will cherish his memory in our inmost hearts.

Thank God, the grave brings with it its blessings! At its bidding, detraction hides its hideous head; the serpent tongue of slander is silent, while that charity which suffereth long, and is kind; which envieth not; which vaunteth not itself; which thinketh no evil, begins to make her sweet tones heard, like the strains of elegiac music.

Would that we all possessed, in the same degree with the deceased, that humanity that meets, in every man, a brother; that sympathy that enters with warmth into the feelings of others; that friendship which glows with generous emotions, and binds us to those we love by the most indissoluble ties; that charity that puts on every dubious action and appearance the most favorable interpretation; that philanthropy that feels with quickness the distresses of others, and that spirit of justice that cheerfully accords to all their due.

IN MEMORY
OF
THOMAS P. STUBBS, ESQ.

W. POE, Esq., as Chairman of the Committee appointed to submit appropriate resolutions expressive of the feelings occasioned by the death of THOMAS P. STUBBS, Esq., and of the estimation in which he was held by the Supreme Court and this Bar, reported as follows:

I beg leave to state, that Mr. STUBBS died on the 4th day of August last, in the forty-ninth year of his age, in this city, in the bosom of his family; of Typhoid fever. He was a native of Jones county, in this State, and had resided in this city about thirty years. The profession of Law was not his original pursuit, nor did he embrace it in the freshness of his youth, nor did he bring with him the sustaining and encouraging smiles of influential friends, nor the support of wealthy patrons, but his main influence was stern necessity, and his chief support was a determined will. His professional career is known to this Court and Bar. From an humble commencement, he continued to rise and expand until—though he died but in the meridian of life—he had reached the highest walks of his profession, and was in the enjoyment of its most lucrative rewards. At the time of his death, Mr. STUBBS enjoyed as large, if not the largest practice in the State; but his labors were not confined to his profession, for his fellow-citizens appreciating his rare qualities, and the conduct of his professional business, rightly concluded, that he would prove a useful representative in the management of the public affairs of the State, and elected him to a seat in the Senate, in which he exhibited the same untiring industry and practical sense, which he had manifested in his professional business; and it is very doubtful whether any man in the State has, in the same short period, ever acquired greater reputation as a faithful, judicious, and intelligent legislator. But his capacity for business, and his professional and political success,

Proceedings in Memory of Thomas P. Stubbs, Esq.

were not the most attractive features of Mr. STUBBS' character, for it is a melancholy fact, that these advantages too often engender feelings of envy and jealousy; but the most attractive and lovely parts of Mr. STUBBS' character, were his moral qualities.

His estimate of himself, was of the humblest kind, and his deference to others was sometimes carried to an injurious extent. There was no sacrifice too great for a friend, and he possessed nothing too good for a friend; but his sympathy for the distressed and afflicted, manifested in deeds of charity and mercy, was almost without a parallel. In the beautiful language of Montgomery,

"Deeds of mercy—deeds unknown
Shall eternity record;
Which he durst not call his own,
For he did them to the Lord."

In support of this opinion, it is a fact, that when the melancholy tidings of the death of Mr. STUBBS was circulated in the streets of this city, it was not replied that we have lost a good citizen, a useful man; but the general response was, The poor have lost their best friend. But his mission in this world is accomplished—his work is done. All that was mortal has mingled with the clouds of the valley. May we remember that though now we are so actively engaged in the struggle and battle of life, that very soon it must all end in "here he lies," and may it teach us humility.

Resolved, That in the death of THOMAS P. STUBBS, Esq., the Bar of Georgia has lost an able, faithful, and valued member; one who has reflected honor on his profession, and whose worth will long be remembered by his surviving brethren.

Resolved, That we deeply sympathize with the bereaved family of the deceased in their crushing affliction, and the more so, as we feel so utterly impotent to impart consolation.

Resolved, That the presiding officer of this Court, be requested to direct the above preamble and resolutions to be entered on the Minutes of the Court, and a copy be furnished his family.

His Honor Judge LUMPKIN, in behalf of the Court, responded as follows:

Perhaps Macon is surpassed by no city in the Union, of the same population, for the wealth and worth of its citizens; and yet

it is no disparagement to survivors to say, that she would have felt the death of none more than the late THOMAS P. STUBBS.—What Andrew J. Miller was to Augusta, he was to Macon. The loss of each to their respective communities, was irreparable. The places which knew such men, shall know them no more forever. In the hearts of many friendless widows and orphans, a monument is erected to the memory of such benefactors, and the tears of the poor are an eloquent tribute to their honored names, which property cannot purchase, and which Kings and Princes might well covet.

When I met his devoted family—so much endeared to him by his love and tenderness for them—clad in the habiliments of mourning, and looking so desolate, notwithstanding he had surrounded them, by his energy and perseverance, with all the comforts of this life, I realized what a privilege it was to weep with those who weep. O, how much I miss his warm and simple-hearted salutation when I come to this Court. Who can ever forget his restless countenance, ever intent upon toil—his modest demeanor—his cheerful and prompt discharge of every duty?

O fatal deceiver, Death! How much sooner should I have expected my own knell to have given another fruitless warning to the world, than that of my much loved and lamented friend and brother.

What is life, but a hasty vision that flies like a dream, as rapid and almost as unsubstantial? What is the whole succession of ages since the commencement of time, in which generations and empires have appeared and passed away, like phantoms gliding over the stage? Poor wanderers of a short and stormy day, we are borne down the stream of Time as on the bosom of a mighty river, in which we rapidly disappear and succeed one another in the midst of its tempestuous waves.

When we are called hence, may our graves, like his, be watered by the widow's tears. May we, like him, receive the reward of the orphans' God, and to His infinite mercy we commit and commend his loved ones. May they be gathered in His arms like lambs, and brought at last to His Heavenly fold.

What a noble example has our friend set to the young men of his State—of diligence in business, regularity and punctuality in

every employment—honesty and uprightness in all his conduct toward his fellow-men, which is the basis of our social connexions. This was the secret by which he achieved his success in life; and here is an example, on which our young men should be proud to form themselves; an example that refutes the dull maxims of idleness and profligacy, and points out the real road, and the only highway in a Republic, to honor, fortune, and fame.

IN MEMORY
OF
BURWELL K. HARRISON, ESQ.

The Committee appointed by the Court to present in behalf of the Bar, a testimonial of respect to the memory of our brother BURWELL K. HARRISON, who has departed this life since the last Term of this Court, respectfully report as follows:

Again has death invaded our circle—again borne away a trophy from our ranks. Let us all read the lesson so sad an event is designed to teach us. Surely, and shortly too, must we quit the stage, and promptly and thoroughly should we prepare for the event. Our brother HARRISON, thus cut down in the prime of life, had for years occupied a prominent place in the Bar of South-Western Georgia. Possessed of a high order of intellect, a thorough education, and almost unsurpassed social qualities, he was an able Lawyer, an interesting associate, and the very life of the social circle. He is gone! Let us remember his virtues—forget his follies—and mourn over his early death. Therefore,

Resolved, That, in the death of BURWELL K. HARRISON, the Bar has lost from its ranks, a superior Lawyer, a cultivated gentleman, and a much loved friend.

Resolved, That we tender to his family our deepest sympathies, and assure them that we, too, feel his loss, and are bereaved of a friend.

W. A. HAWKINS,	} Committee.
B. S. WORRILL,	
E. H. BEALL,	
P. I. STROZIER,	

His Honor, Judge LUMPKIN, responded as follows:

When we were last assembled, as a Court, in this place, twelve months ago, it was to deplore the untimely death of the youngest member of this Bar—for it is a sad truth, that

Proceedings in Memory of Burwell K. Harrison. Esq.

"Youth, and hope, and beauty's bloom,
Are blossoms gathered for the tomb."

Since that time, five more from this District—**POWERS**, **STUBBS**, and **HOLSEY**, and **CORBITT**, and **HARRISON**—have joined the disembodied spirits of the dead. Thus are we called away one by one, without distinction of age, or rank, in obedience to the inevitable summons which comes but once—but comes to all.

Over the remains of how many members of the Bar, has the grave closed since I took my seat upon the Bench, in 1845, whose earthly prospects were bright with hope, and whose professional character might well be adopted by their cotemporaries, as, "the glass of fashion, and the mould of form?"

BURWELL K. HARRISON was a native of Georgia; educated at Randolph Macon College, Virginia, and, in 1842, located at Lumpkin, Stewart county. A thoroughly taught Lawyer, and of fine literary attainments, an inviting field spread out before him. His intellect—brilliant, fertile, and acute—was admirably adapted to the region where he lived and died. He was a keen observer, and no one could appropriate more readily, what he acquired from men and books. He had a ready and clear perception of truth and justice; and as a lawyer, he was more inclined to rest his hopes of success on this perception, than on the accumulation of authorities. Instead of depending entirely on the thoughts of others, and an array of precedents he had not analyzed, he delighted more in the application of elementary principles to the ever varying occurrences of life and business.

The social qualities of the deceased were unsurpassed. A man of wit, endowed with an intuitive perception of the ridiculous—generous to a fault—full of frolic and fun, and of the most exuberant animal spirits, he was ever the magnet of the circle in which he moved. The sterling piety of his companion, impressed him with a reverence for religion, which made it the frequent theme of his conversation.

That the deceased had faults, it is due to candor to concede. Let them be buried in the grave with him. "Man goeth to his long home," to the "house appointed for all living." Let us lay up treasure for that state of being where there is no change and no

Proceedings in Memory of Burwell K. Harrison, Esq.

end. **May a God of love be a husband to his widow and a father to his orphans.**

“ A bruised reed He will not break,
Afflictions all His children feel,
He wounds them for His Mercy's sake,
He wounds to heal.”





CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT
MILLEDGEVILLE, NOVEMBER TERM, 1859.

Present—JOSEPH H. LUMPKIN, }
 LINTON STEPHENS, }
 RICHARD F. LYON, } JUDGES.

THE TRUSTEES OF THE MONROE FEMALE
UNIVERSITY vs. BROADFIELD *et al.*

1. When carpenters agree to do work, according to specifications, in a neat and workman-like manner, and fail, not only to comply with the contract, but do the work unskillfully and negligently, they are liable to respond in damages to the employer, for all injuries resulting from the breach of the contract.
2. The fact, that the employer accepts the work, and agrees to pay for it according to contract, does not relieve the carpenters from such liability, unless the employer, at the time, know of the deficiencies, or breach of contract, and expressly agreed to waive his rights under the same, which must affirmatively appear.
3. A new trial must be granted, when the verdict is contrary to Law and evidence, notwithstanding there have been two concurrent verdicts of the Jury.

Assumpsit, in Putnam Superior Court. Tried before Judge
HARDMAN, at the September Term, 1859.

This was an action of Assumpsit, by the Trustees of the
Monroe Female University against James M. Broadfield and

The Trustees of the Monroe Female University vs. Broadfield *et al.*

Tunis Tunison, to recover damages for a breach of the following contract, viz:

"STATE OF GEORGIA, County of Monroe. To-wit: Whereas, the Trustees of the Forsyth Female Collegiate Institute have engaged the undersigned to finish and complete the old Botanic Brick Building, at Forsyth, in said county. The undersigned agree, on their part, to rough-cast the whole of the outside of said building with hydraulic cement, and give to it a complete finish, in such color as said Trustees may direct; and, also, to repair the roof of said building with tin gutters, and each side and ends with large tin conductors on each corner of the building. To remove the present dome, and tin over the same, neatly and water-tight, and should any of the shingling need repairing, to repair the same, so as to make the whole of said roof a good one. To remove certain walls, and put in such pillars as might be necessary to support the ceiling, and to repair and put in such girders as, on examination, may be found necessary, and to make a nice and complete finish of the Assembly room, in the best modern manner.

"The other rooms of the upper story to be finished, out and out, in a neat and workman-like manner; all the jams of the windows to be plastered, except the Assembly room, where the windows are to be plastered: no wood work to be done on the basement, except outside doors and windows, sash and glass in the windows. Every part of said building requiring paint, to be painted; the floors in the second story now there laid, in said building, to remain, with such smoothing and nailing as may be necessary. The window sash to be hung with cords, and pulleys, and weights. The whole of the work necessary to complete and finish the second and third stories, including floors, doors and window-sash, glass, and every other thing, with a rostrum in the Assembly room, and fifty feet of black board, to be done by the undersigned in a neat and workman-like style. The undersigned to furnish all materials, and to board themselves and workmen. Window blinds not included. And the undersigned further agree to finish said work by the first day of January next. This August 19th, 1852.

(Signed)

J. M. BROADFIELD,
T. TUNISON.

And the Trustees agree on their part to pay the said J.

M. Broadfield and Tunis Tunison, on the performance of their agreement aforesaid, the sum of dollars.

August 19th, 1852.

(Signed)

OLIVER C. PHELPS,

President of the Board of Trustees
of Forsyth Female Collegiate Institute.

The declaration set out the breaches complained of.

The defendants pleaded the general issue, and further pleaded specially, that plaintiffs were present during the progress of said work; and after the completion thereof, accepted and received the same, and have been in the use of the building for two years, or more, before the commencement of this suit, &c.

At the trial, plaintiff read, in evidence, the depositions of D. F. Walker and Richard Bennet, the substance of which was, that the plastering and frame work, overhead in the Chapel of the building belonging to the Monroe Female University, fell, in the month of July, 1854. The principal part fell, so that all had to be taken down. There was one chestnut girder supporting the ceiling, wholly unfit for the purpose, being extremely brash and full of knots, and incapable of supporting the weight. There ought to have been two more columns for the support of the girders which have fallen. The damage done by the falling of the girder, they think, amounted to five hundred dollars. The ceiling looked very well if it had had strength, that is, columns sufficient to support it, it would not have fallen. The deponents are carpenters. It cost \$530 00 to repair the damage—it was repaired at moderate charges. The work was not done in a workmanlike manner. The roof was in bad condition when defendants quit work on it—it leaked so as to injure the whole house. The roof leaked, which increased the weight so that the weak timbers could not support it, and this was the cause of its fall. Mr. Bennet examined it three days before it fell. The work was done in 1853; it fell in July, 1854.

By a second commission sued out, plaintiffs proved by D. F. Walker, the aforesaid witness, that the room which he called the Chapel, was the one used on commencement occasions, for concerts, &c.; that he called it the Chapel, but it might appropriately be called the Assembly room, and it is the *only room* in the building that could be termed the Assembly room.

The Trustees of the Monroe Female University vs. Broadfield et al.

Plaintiffs here closed, and defendants proved by a witness—James O. Clark—that he assisted in the work done on the building, in 1852 and 1853. He was employed as a plasterer. That portion of the work witness had in hand was done in a workmanlike manner. It was satisfactory when finished, according to the best of his knowledge; heard no objection to any portion of the work after its completion, and was received by plaintiffs. They also agreed to settle for it according to the contract. The building was used and occupied for a School after the work was completed; plaintiffs examined the building after it was completed, and heard them say they would receive it when a certain spot on the wall was repainted.

Upon this testimony, the case was submitted to the Jury, who found for the defendants; whereupon plaintiffs moved for a new trial on the ground that, the verdict was contrary to Law and evidence, which motion the Court refused, and plaintiffs excepted.

J. WINGFIELD, for plaintiffs in error.

ADAMS and DAVIS, *Contra*.

By the Court.—LYON, J., delivering the opinion.

The defendants entered into a written contract with plaintiff, to finish and complete the old Botanic brick building at Forsyth, furnish all materials, &c., according to specifications particularly set out in said contract, for which the plaintiffs agreed, as is stated in the pleadings, to pay them \$3,527. The defendants entered upon the work, and afterwards delivered the building to the plaintiffs, which they accepted as finished according to the contract, and agreed to pay defendant for the same, and did pay, as is also stated, the amount agreed on by the contract, except something less than \$200. The work was finished in May, 1853, and in July, 1854, one of the girders, and framing supporting the ceiling and floor above the Assembly room, or Chapel of the building, gave way and fell. The girder that gave way, and which evidently caused this mischief, was of chestnut, brash, knotty, and wholly incapable of supporting the weight made to rest upon it. To repair this damage, occasioned by the giving

way of the girder, and of frame work, and falling of plaster, and to repair and refit the Chapel, or Assembly room, was worth \$500. It actually cost the plaintiffs \$535 to have the work done over at moderate charges. The roof, at the same time, was in bad order, it leaked so as to damage the whole building, and to repair the roof and put it in good condition was worth \$500. This action was brought, by the plaintiff, against the defendants to recover these damages, amounting in the whole, to \$1,000.

1. The written contract of the defendants, in these respects, was, that they would "repair the roof with tin gutters at each side and end, with large tin conductors on each corner of the building, to remove the present dome and tin over the same, neatly and water-tight, and should any of the shingling need repairing to repair the same, so as to make the whole of said roof a good one; to remove certain walls and put in such pillars as might be necessary to support the ceiling; to repair and put in such girders as, on examination, may be found to be necessary, and to make a nice and complete finish of the Assembly rooms"—the whole "to be done in a neat and workmanlike manner."

This is what defendants undertook, and agreed specially to do. Instead of performing their said contract, they either wholly failed to do so, or done the same in such grossly unskilful, and negligent manner, as to cause these damages to the plaintiffs. The breach of the contract on the part of the defendants, as well as the damages sustained by the plaintiffs in consequence, are clearly and incontestably established by the evidence. Upon these facts, the plaintiffs were entitled to a verdict against the defendants for the amount of damages proven, the same being \$1,000; for no rule of Law is better settled than, that for every breach of a contract, the wrong doer must respond to the injured party, in damages to the extent, and in satisfaction, of the injury received.

2. That the plaintiffs received the work, and paid for it, or agreed to do so, does not affect their right to recover in the slightest degree; it is not even a circumstance to be considered against that right. They are entitled to recover, unless they, at the time of the acceptance, knowing of the defective and neglected work, of the non-compliance by defendants with their contract in all respects, expressly waived a performance of the contract, and agreed to pay the stipu-

The Trustees of the Monroe Female University vs. Broadfield et al.

lated prices, notwithstanding. All of which must be made, affirmatively, to appear by defendants, to be available to them as a defence. The evidence in this case falls very far short of this. Was the attention of plaintiffs called to the fact, that an important girder was brash, knotty, and entirely incapable of supporting the weight resting on it; that the lives of the pupils assembled in the room below, would be constantly exposed to the risk of the accident that subsequently did happen? Their attention was not called to it, and they could not see and examine the girder for themselves, for it was concealed from their view by the floor on one side and the overhead ceiling on the other. Did they see and know that the ceiling of the Assembly room, or Chapel, was not sufficiently supported by pillars? It is said, that this was such an open palpable defect, that the plaintiffs must have seen it. True, they could see the number of pillars, but they were not informed as to the number necessary. The defendants undertook, specially in their contract, to put in such pillars as might be necessary to support the ceiling; *they* were to judge, and to judge correctly, at their peril. The plaintiffs were not presumed to know how many were necessary, else they would have stipulated for the exact number in the contract; being ignorant they left that to the discretion and judgment of the defendants.

Again, did the plaintiffs go on to the roof, examine it, and see and know that it leaked, so as to damage the whole house? And that, with a full knowledge of all these defects and omissions on the parts of defendants, they still accepted the house and agreed to pay the same price for it, as if it had been done in a neat and workmanlike manner? It is absurd to think so. So far from it, when they accepted the house, they discovered a spot in the wall a little darker than the balance, and they required even this small defect to be remedied before receiving the work. If they were so particular as to a small matter, how much more so would they have been had their attention been called to the great and serious deficiencies in this work. The idea, that they were waiving any of their rights under the contract, never entered their minds—they stood upon the contract, felt bound by it, and accepted the work because they believed that defendants had complied.

We are well aware of the rule, that when work is done under a special contract, and the employee accepts the work in

an incomplete and unfinished state, that then he cannot enforce the contract as to price, &c., but that he must pay for the work actually done, according to its worth, or *pro rata*. This is not that case, but a very different one, and governed by different principles, as we have already shown.

3. The fact, that two concurrent verdicts of the Juries have been given for the defendant, makes no kind of difference in this case. The rights of the plaintiffs are too clear and manifest, and the verdict too strongly against the Law and the evidence, to let this Court attach the slightest importance to the mere concurrence of Juries in the same finding. Those Juries might have been influenced by something that is not before us, and we presume were; for how a Jury could do otherwise, than find for the plaintiffs, upon this evidence, if they were properly instructed as to the Law, we cannot comprehend. Let that be as it may, this verdict is against the evidence and Law, and a new trial must be granted.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT
ATLANTA,..... MARCH TERM, 1860.

Present—JOSEPH H. LUMPKIN, }
 LINTON STEPHENS, } JUDGES.
 RICHARD F. LYON, }

NICHOLS vs. McABEE.

1. A claim, exceeding the amount over which a Justices' Court has jurisdiction, may be brought within the jurisdiction, by payments which reduce it to that amount.
2. When so reduced, it is within the Statute which allows a plaintiff in Justices' Courts (under certain circumstances) to prove his account by his own oath.

Certiorari, in Catoosa Superior Court. Decision by Judge CROOK, at the Novembr Term, 1859.

This was a *certiorari* sued out by Isaac B. Nichols against L. W. McAbbee, to have reviewed and reversed a judgment of a Justices' Court, rendered in favor of McAbbee, a case in which he was plaintiff, and Nichols was defendant.

It appeared, from the return of the Justices', made to the *certiorari*, that McAbbee sued Nichols in the Justices' Court for a balance of thirty-four dollars and fifty cents, due for services rendered. The original demand, or account, was

one hundred and thirty-four dollars and fifty cents, upon which plaintiff admitted, or acknowledged, a payment of about one hundred dollars, and the suit was brought to recover only this balance of thirty-four dollars and fifty cents.

The defendant pleaded the general issue and set-off. At the trial in the Justices' Court, plaintiff proved, by his own oath, that he had rendered nine months and sixteen days work, at the rate of one hundred and seventy dollars per annum, and that Nichols owed him a balance of thirty-four dollars and fifty cents; in other words, that Nichols had paid him one hundred dollars. Defendant (Nichols) offered, in support of his pleas, his book of accounts, showing an indebtedness to him, by plaintiff, of twenty-one dollars: the book was proven by defendant's own oath.

The answer of the Justices' state, but not clearly, that defendant, at the first trial before the Justices' Court, proved, by the depositions of one Foster, a former settlement of all accounts, to date, between the parties.

The Jury (the case was on the appeal in the Justices' Court) found for the plaintiff thirty-four dollars and fifty cents. Whereupon, defendant excepted and sued out *certiorari*, on the grounds—1st, Because the Justices erred in allowing plaintiff to prove his account by his own oath, the same being, originally, for one hundred and thirty-four dollars and fifty cents. 2d, Because the Justices erred in taking jurisdiction of the case, involving an amount over fifty dollars.

Upon hearing the *certiorari*, the presiding Judge dismissed the same, and affirmed the judgment of the Justices' Court. To which decision counsel for defendant (Nichols) excepted.

McCUTCHIN, for the plaintiff in error.

HACKETT, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. None of the Court felt any difficulty, in this case, in affirming the ruling that a demand, whose amount places it beyond the jurisdiction of a Justices' Court, may be brought within the jurisdiction, by payments reducing it.

2. But whether an account, so reduced, is within the Stat-

Whitworth vs. The State of Georgia.

ute allowing the plaintiff (under certain circumstances) to prove his demand by his own oath, was a more difficult question. I thought, and still think, that the case is not within that Statute, upon a sound and safe construction of it; but my colleagues informed me that a different construction had prevailed in the Courts for a great number of years, and, with entire uniformity, to the extent of their knowledge on the subject. I was not prepared to dispute it, and therefore, acquiesced in what seemed to be established by authority.

Judgment affirmed.

WHITWORTH vs. THE STATE OF GEORGIA.

Where the Court refuses a continuance in a Capital Case, on account of the absence of testimony, material for the prisoner's defence. a New Trial will be granted.

Murder, in Chattooga Superior Court. Tried before Judge CROOK, at the March Term, 1859.

This was an indictment charging the defendant in the Court below, with the murder of E. M. Hall.

When the case was called for trial, the defendant moved the Court to continue the same, and for that purpose, submitted a showing in writing, sworn to and subscribed before the Clerk in open Court, stating that he was "not ready for the trial of said case; that Lucinda Gaddis, who had been subpoenaed, and lived in the county of Cass, was a material witness for him; that he had been informed, and believed, that she was unable to attend said Term of said Court, on account of her sickness; that he expected to be able to prove by the witness, that on the 31st day of March, 1857, she went to the residence of E. M. Hall and found him lying in the dwelling house dead, and Mary Hall, his widow, and one

Mr. Holloway, were standing in the dark, or came together from some unknown place in the dark, and stopped behind the kitchen, and that the witness overheard them talking about renting the land, and buying and selling whisky, saying, "What shall we do with the land? Shall we, or had we better rent the land?" Also saying, "we can buy whisky at so much by the gallon, and sell at such and such profit," and talking of "living and doing business together"; and that they, Holloway and Mrs. Hall, were both very near drunk; that Mrs. Hall then went down to the grocery, Askew Brock and Holloway with her; that witness then went down to the grocery to bring Mrs. Hall to the house, and when she got to the grocery she saw Mrs. Hall lying on the floor drunk; that Brock and witness carried Mrs. Hall to the house and put her to bed, where she (Mrs. Hall) remained until 10 o'clock in the day; that Mr. Robert A. Brock is also absent, by whom the defendant expected to prove certain facts set forth in a former showing for a continuance; that the defendant expected to have the benefit of the testimony of Dr. G. B. T. Maddox, by whom he expected to prove that, if the blow was struck at the grocery it would have bled before they got to the House, some 150 yards from the grocery; that the showing was not made for delay, but for the purpose of obtaining justice; that Dr. Maddox, as defendant understood, was sick and unable to come into Court; that there was no other evidence to satisfactorily establish the facts detailed in the showing."

The motion was overruled, and the continuance refused.

Evidence for the State.

MARY HALL testified that: On the 30th of March, 1857, in the county of Chattooga, and about 3 o'clock, the deceased, Holloway, Brock, and Butler, were all at the grocery of the deceased, and remained there until about dark, when deceased called to witness to bring a light to the grocery; that she went down to the grocery and found deceased fastened up in the grocery; that deceased opened the door and requested witness to come in with the light, that he might look for a gun; that Brock came in, and after looking, said there was no gun there; deceased found no gun; deceased and witness then went out of the grocery, and started toward the house, which was some 75 yards distant; when they had gone

Whitworth vs. The State of Georgia.

about ten steps on the way, deceased stopped, saying there was a pound weight about there, and when in the act of looking for the weight, some person, at that time unknown to witness, but which turned out to be the prisoner, stepped up and struck deceased on the right side of the head with a gun, and when witness said something to the person striking, he replied, "If you say any thing I will knock you down." Witness and Brock carried deceased to the house, and he never spoke after the blow was given; witness threw down the light (which was a pine torch) when the blow was struck. After the deceased was taken to the house, the prisoner and Holloway came to the house, and the prisoner brought the gun into the house, and, in a little while after, dropped it down on the floor, and left. The gun exhibited was Holloway's gun, (as he said) and it was the gun used on the occasion. Prisoner did not return to the house that night; witness saw Holloway frequently that night—he and Brock, and Butler, stayed all night. Dr. Watts being sent for, came to see the deceased in about one hour after the blow was given. When the deceased was first carried to the house after the blow was given, witness set him down in a chair until a matress was fixed, and then laid him on the matress; put some soot and water on his head before he was laid on the matress; he bled a great deal, and was moved several times because he bled so much; he was also moved by Dr. Watts in fixing the wounds. Witness never saw prisoner until the night of the difficulty; had seen Brock and Holloway before; they moved into the neighborhood about Christmas; had not seen either of them since the night of the difficulty; deceased was engaged in the business of retailing liquors; heard the deceased say that he had credited Holloway and Brock as long as he was going to, and intended to tell them so when he saw them; witness got the grocery key out of the pocket of deceased, before he died, and gave it to Brock and Holloway to go and get liquor to give to the deceased; witness went to the grocery next morning, in company with Mrs. Watts, to get some coffee; witness drank some liquor that night because she was sick, but did not drink much, and knew all that occurred after day-light.—When prisoner was brought back next morning after the difficulty, he said, in the presence of Esquires McClung and Knowles, that he had done the murder; witness did not say,

next morning, to the persons at the house that they could leave, nor that she would order the Coroner off if he came; nor did she say, on that morning, that Mr. Hall was dead and gone to hell, and that she was glad of it; never told Mrs. McClung about eight days before deceased's death, that he and witness would not live long together, nor that somebody would kill him, or drive him off; nor that he should leave witness. Mr. Bryant was the brother of witness' first husband—lived in call of the house; and in the life-time of witness' first husband, she usually called on Mr. Bryant for any wanted assistance, but after her marriage with deceased, she did not call on Bryant, as he and deceased had had a falling out; did not go to the grocery on the night of the difficulty and set out liquor, saying, "this is the widow Hall's grocery"; witness was in bed next morning, but did not recollect about going to bed; witness was not cognizant of what transpired a portion of the time after deceased's death; when prisoner admitted striking deceased, he gave no excuse for the act, but said he could not deny it with a clear conscience.

Dr. MADDOX testified that: He saw Mr. Hall, after his death, about two or three o'clock; had a wound on the right side of his head, which caused his death; both tables of the cranium were fractured; one fracture was about four, and the other about six inches long; he saw him on the 31st of March, 1857, in Chattooga county; the wound on deceased's head, ranged from the right ear over the top of the head, and might have been made with one or with two licks, and from its appearance witness thinks it must have been given from the side of the deceased on the right; if the wound did not bleed at once, the motion in carrying deceased to the house would have started it to bleeding; the room where deceased lay was very bloody, but witness, upon looking, saw no blood between the grocery and the dwelling; if the wound had been made with a sharp instrument, the blood would have appeared much sooner than if given with the barrel of a gun.

JOHN D. KNOWLES testified that: He was one of the magistrates who committed the prisoner on the 31st of March, 1857, in Chattooga county; prisoner, on that occasion, admitted that he struck deceased a lick; his words were, "if you must have it, I struck him a lick"; he seemed excited and uneasy, and did not appear to know what he was doing; said

he wanted a certain man to have his gun, and wanted to know how long it would be before they would hang him; witness, with four or five others, reached the house of Hall about sun-up on the morning after the difficulty; found Mrs. Hall in bed, and drunk, and she did not get up while witness stayed; she said there was no use for a Coroner, nor for those who were there; there was blood all over the floor; saw blood on the facing of the grocery door, as though rubbed off from one's clothes; saw one little spot of blood about eight steps from the grocery door, but saw no more between the grocery and the house; has known Mrs. Hall for 17 or 18 years, and had the means of knowing her general character, which is not very good, and from his knowledge of her general character could not believe her on her oath; never heard any thing against her truthfulness until after this difficulty.

WESLEY TEMPLES testified that: On the morning after the difficulty, he was at the place deceased was said to have been killed, which was about ten steps from the grocery; saw a small spot of blood there, also the mainspring of a gun-lock, which was then and there picked up; saw some blood on the gate-post about the latch of the gate, and about the height that one would be carried, if carried, through the gate; saw no other blood between the dwelling and the grocery, except that already mentioned.

DANIEL COLLINS testified the same as Temples, and also that he saw some blood which seemed to have been rubbed on the facing of the door of the house about four inches from the floor, and also some blood on the facing of the grocery door, which appeared to have been put on with hands, about as high up as one would put the hand in opening the door; prisoner was brought back by Clopton Henly, and others, and was identified by Mrs. Hall.

E. M. FANT testified, that he was present on the morning after the difficulty, and heard the prisoner admit that he gave deceased the blow; the prisoner did not look like he knew what he was doing, and wanted to know if they were going to hang him that evening.

JEREMIAH MURPHY testified that: The prisoner passed his house a short time before those in search for him; he was going in a direction from the house of deceased on the morning after the difficulty, and inquiring the way to Alabama; witness heard him say, when he was brought back, "you had

Whitworth vs. The State of Georgia.

as well hang me now as any other time"; he appeared to be in great distress; saw the spot of blood near the grocery; saw blood on the facing of the grocery door, and on the gate post. Has known Mrs. Hall since 1850, and from his knowledge of her general character would believe her on her oath.

LARKIN DAVIS testified that: He was present when prisoner was examined before the magistrates, and when asked as to his guilt, he replied, "I reckon I must say it was me that struck the blow"; and after he was spoken to again, he said, "I don't want to die with a lie in my mouth."

DAVID W. STRANGE testified that: He lived in the neighborhood, and knew Mrs. Hall's general character, and would believe her on her oath.

ALFRED COOK testified that: At the examination of prisoner, when questioned as to his guilt, he replied, "Yes, I struck the lick, and it is too plain to deny"; and when some one remarked, "poor fellow," he then said he was drunk, and did not know whether he did it or not; witness saw the blood near the grocery, and saw a pound weight picked up near the blood spot; had lived in the neighborhood about four years, and about one and a half miles from deceased; knew Holloway who had been about there two or three months; on the day of prisoner's examination Holloway was present, and under arrest, but was discharged after prisoner was taken off; prisoner did not live in the neighborhood, and witness never saw him until that day; he was inquiring the way to Alabama; Mrs. Hall has had a bad name, both before and since the difficulty.

Evidence for the Defendant.

JOHN D. KNOWLES testified that: He saw two pound weights lying on the ground, the day after the difficulty, about 20 or 25 yards from the grocery, rather angling from the grocery toward the house.

A. B. MALONEY testified that: He was at the house of deceased on the morning after the difficulty, and saw blood on the grocery door, which seemed to have been smeared; Mrs. Hall was setting at the head of her husband's corpse; she was in liquor, and said for those persons who were there to leave; that they had got Hall; he was dead, and she reckoned was in hell; had known Mrs. Hall's general character for several years, and would not believe her on oath.

Mrs. McCLUNG testified that: She was at deceased's house about eight days before the killing; that then and there Mrs. Hall told witness that she was not going to live with Mr. Hall long; that he was quarrelsome, and she would get shut of him, or that somebody would kill him; that the place where deceased lived, was her (Mrs. Hall's) place, and she would not leave there; had seen Mrs. Hall drunk twice; had known Mrs. Hall ten or eleven years; was acquainted with her general character, and would not believe her on oath.

JONAS McCLUNG testified that: He was at the house of deceased on the morning after the difficulty, and found deceased dead, and his wife lying on the bed in the same room about as drunk as people ever get to be; saw blood a few steps from the grocery, and some on the door of the grocery; was acquainted with Mrs. Hall's general character, and would feel at liberty to doubt her oath; on the night of the difficulty, witness was burning a coal kiln; prisoner came there drunk, said he was lost and wanted to go to Holloway's; also inquired the way to Alabama, and set at witness to go with him to Holloway's.

THOMAS GADDIS testified that: He lives about one and a half miles from deceased's house; that he and his wife, and Askew Brock, who came after witness and his wife, went to the house of the deceased, arriving about one hour and a half before day on the morning after the difficulty; found Holloway and Butler there; Mrs. Hall was intoxicated, and with Brock and Holloway, went down to the grocery; soon after witness went down also, and found Mrs. Hall leaning on a barrel; went back to the house, and after a little while returned to the grocery and found Mrs. Hall lying on the floor, and Holloway on her; as soon as day come, Holloway and Brock took Mrs. Hall to the house, and witness went home; witness took Butler, Brock, Holloway, and Mrs. Hall, all to be drunk; when prisoner was brought back, Mrs. Hall pointed him out as the man who killed her husband, to which prisoner made no reply.

ALLEN BRYANT testified that: He lived about a quarter and half-quarter of a mile from deceased, and had known Mrs. Hall sixteen years; her first husband was brother of witness; heard of the difficulty about 8 o'clock next morning; before that time witness was usually called on for any wanted assistance by Mrs. Hall; knew the general character

of Mrs. Hall, and would hardly believe her on oath; witness was not friendly with deceased for a month before the difficulty; heard prisoner admit on his examination before the magistrates, that he struck the lick; saw a gun said to be the one used.

RICHARD ECHOLLS testified that: He knew Mrs. Hall's general character, and would not believe her on oath.

ELISHA HENLEY testified that: He had been acquainted for about five years with Mrs. Hall's general character, and would believe her in cases where she had no prejudice, but in other cases he would not believe her on oath.

Evidence for the State in Rebuttal.

GEORGE LATIMER testified that: He was acquainted with the general character of Mrs. Hall; had heard that she drank too much, and kept company with other men than her husband, but from his own knowledge of her, thought he would believe her on oath.

SAMUEL DAVIDSON testified that: He was acquainted with the general character of Mrs. Hall—having lived within one and a half miles from her, fourteen years, and although he had heard reports against her virtue, still he would believe her on oath.

The Jury returned a verdict of guilty.

Defendant made a motion for a new trial in the Court below, on the following grounds:

1. Because the Jury found contrary to Law.
2. Because the Jury found contrary to evidence.
3. Because the Jury found contrary to Law and evidence.
4. Because the Jury found a verdict strongly and decidedly against the weight of the evidence.
5. Because the verdict is strongly and decidedly against the Law and evidence.

6. Because the Court erred in refusing the defendant a continuance on, the motion and showing made by him, and herein before mentioned.

8. Because one of the jurors who tried the case, was not a fair and impartial juror, but had formed and expressed an opinion against the defendant before the trial of said case, which fact was unknown to prisoner or his counsel until after the trial.

The hearing of the motion for a new trial was postponed, and moved, by agreement of counsel and order of the Judge.

Whitworth *vs.* The State of Georgia.

from time to time, until it was finally heard at Gordon Superior Court, on the 4th of April, 1859, and upon the hearing the motion, was over-ruled, and the new trial refused by Judge CROOK; and his decision and judgment in the premises, are alleged as erroneous.

F. C. SHROPSHIRE, for the plaintiff in error.

J. A. W. JOHNSON, Solicitor General, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

My judgment is, that a new trial should be granted in this case; on the ground, that the Court erred in refusing the motion made by the prisoner for a continuance.

Upon a dispassionate examination of the evidence in this record, can it be denied but that there is a mystery enveloping this tragedy? How, where, when, and by whom, was Hall killed? There is more or less uncertainty attending each head of this inquiry.

In candor, I confess that I think it possible, if not probable, the fatal blow was inflicted by the prisoner, and between the dwelling-house and the grocery; and yet, my mind is not free from doubt, as to these material facts.

It is frankly admitted by the prosecuting officer, that no reliance can be placed upon the uncorroborated testimony of Mrs. Hall, the wife of the deceased. Such depravity has rarely been witnessed, as was exhibited on this melancholy occasion by this miserable woman. Whitworth's conviction must rest alone upon his own confessions. And under other circumstances, perhaps, they would be deemed sufficient and satisfactory, notwithstanding it is conceded he had no controversy, or cause of quarrel with the deceased. If he struck at all, it must have been to avenge the offended pride of his kinsmen, Holloway and Brock, whose credit had been stopped at the grocery, or to accomplish some more unholy purpose, by removing Hall out of their way. They instigated the blow. It was inflicted with Holloway's gun. Is it impossible, in the condition the prisoner was in that night, for him to have been made to believe that he, and not Holloway or Brock, was the slayer?

This, at least, is the theory of the prisoner's defence, and

a deep impression has been made upon the public mind as to its probability, if not its truthfulness. Hence the mammoth petition from the neighborhood where the trial was had for his pardon, including, it is said, eight of the Jurors who tried the case, the other four having left the country. Hence the almost unanimous vote of the Senate and the large majority vote of the House for the bill, introduced by Mr. Echols (who was the Sheriff of Chattooga at the time) that arrested Whitworth. The veto of the Governor, if I remember right, (I have not the message before me,) was put upon technical grounds, and not upon the merits; and mainly because this writ of error was pending before this Court.

A clear legal right, then, having been withheld from the prisoner, and evidence thereby kept back from the Jury, which was germane to the prisoner's line of defence, I am unwilling that his blood should be upon my hands. If, with all the testimony before the Jury, they see fit to convict the defendant, it is their province and privilege to do so. But why should I desire to thrust myself into the Jury box, and usurp their functions? I have neither the wish nor, in my humble opinion, the right to do so. It is for them, and not for me, to say what weight the absent proof shall have, in determining the guilt or innocence of the accused.

Judge Story, in commenting upon the clause in the Constitution of the United States—and which is but a reenactment of the British Statute of Edward III., which requires, in cases of treason, the confession to be made *in open Court*, to justify a conviction—speaks of this provision as founded upon the great policy of protecting men from “unguarded confessions, to their utter ruin.” “It has been well remarked,” he says, “that confessions are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor or menaces, seldom remembered accurately, or reported with due precision.” *Story's Com. on the Const.*, 3d vol. 671.

Read the testimony of John D. Knowles and E. M. Fant, as to the state of the prisoner's mind when these confessions were made, and no one will wonder at the subsequent excitement, which has resulted from this trial and conviction.

CASH AND OTHERS *vs.* WILLIAMS.

Unless the Judge of the Superior Court manifestly abuses his discretion, in refusing to dissolve an injunction, this Court will not interfere, especially where it is apparent that no particular injury will accrue to the defendant by the delay, and where it is desirable that there should be first a final hearing upon the merits.

In Equity, in Cass Superior Court. Decision, on motion to dissolve injunction, by Judge WALKER, at Chambers, 29th February, 1860.

This was a bill by B. F. Williams against Jesse Cash and others, to enjoin a judgment recovered in an action of ejectment by Cash against Williams, and also to set aside said judgment, and to quiet complainant in the possession of the land sued for and recovered in said action of ejectment, and to compel defendant to execute a deed of conveyance for said land to the wife of complainant.

The bill alleges that complainant married the daughter of defendant Cash, and that in pursuance of an agreement between them, complainant entered into possession of said land about the year 1845, and made clearings and improvements thereon, and built a comfortable dwelling house, and has been in the peaceful possession of the same since the time of his entry aforesaid. That defendant promised and agreed, in consideration that complainant would thus enter upon and improve said land, to execute a deed for the same to complainant's wife, as a part, or an advancement to her, of defendant's estate. The bill alleges that in violation of this agreement, defendant instituted his action of ejectment against complainant for said land, and has recovered judgment therein, and threatens to eject complainant from said premises.

The defendants answered the bill, Jesse Cash denying the statements of the bill as to the contract or agreement therein set up, but admitting, substantially, its other allegations and charges.

Upon the coming in of the answers, defendant moved to dissolve the injunction which had been granted, upon the grounds, that there was no equity in the bill, and that if any, it had all been fully sworn off by the answers. After argu-

ment, the Judge refused the motion to dissolve the injunction. To which refusal defendants excepted.

WM. T. WOFFORD, for plaintiff in error.

MILNER & PARROTT, *contra*.

By the Court.—LUMPKIN J., delivering the opinion.

Was the Circuit Court right in refusing to dissolve the injunction in this case? or rather was it guilty of such a flagrant abuse of its discretion, as should constrain this Court to reverse its judgment?

Perhaps, had His Honor have dissolved the injunction, we might not have felt bound to overrule him. Having seen fit to refuse the motion, we are not inclined to interfere.

In a case like this, it is difficult for this Court to give the reasons which control their decision, without prejudicing the case on the final trial. Suppose we were to put it upon the ground, that notwithstanding the answer swore off the equity of the Bill, still we would retain the injunction, because the answer was incredible. This would damage it as evidence, and injure the respondent's case generally. We must be guarded in justice to both parties, as well as from a becoming respect for the province of the jury, whose peculiar privilege it is to pass upon the merits of the case.

Mr. Cash professes to have instituted this suit, not so much for the purpose of ejecting his son-in-law and daughter from the land in dispute, as to establish his title to the premises. A little longer delay then will not be detrimental to him.

In answer to the position assumed in the argument, that Equity will not enforce a voluntary agreement, we would suggest: That if the complainant establishes, by satisfactory proof, the case made in the Bill, the question as to the power of a Court of Chancery to enforce a gift or gratuity, will not arise. There is a valuable consideration set forth for the agreement, which the complainant is seeking to compel Mr. Cash to execute.

Judgment affirmed.

Daniel R. Mitchell *vs.* Western & Atlantic Railroad.

DANIEL R. MITCHELL *vs.* WESTERN & ATLANTIC RAILROAD.

1. A Railroad Company is liable only for such damages as result from its mismanagement, neglect, or the want of due care and attention. And it is necessary for the plaintiff to show some act that will cast the burden of proof on such Railroad Company. The fact that a negro is run over and injured, while being transported by the Road as a passenger, is not sufficient for that purpose.
2. The liability of a Railroad for injuries to slaves in their transportation, is to be measured by the law applicable to passengers, rather than by that applicable to the carriage of common goods.
3. Less care and caution is necessary by the employees of a Railroad, when stopping for wood and water only, than when stopping to take on or put off passengers.
4. It is no error in the Court to refuse to charge a principle of Law, however sound, unless such principle has some application to the case on trial.
5. The fact that the Superintendent of the Road is on the train, and in the same car where the negro injured was seated, is not even a circumstance to charge the Road for injuries received by the negro at that time.
6. If the train stop at a wood and water station, and start again in an unusual short time, or with unusual speed, or without blowing the signal whistle at all, or sufficiently long before starting to put persons on their guard, and an injury happens at the time to a slave passenger, any one of these facts will be sufficient evidence of neglect or mismanagement, to charge the Road for all damages received at the time by such negro.

Case, in Cass Superior Court, and motion for New Trial.
Heard and decided by Judge CROOK, October Term, 1859.

This was an action on the case, brought by Daniel R. Mitchell against the Western & Atlantic Railroad, to recover damages for injuries received by plaintiff's slave on board the cars of defendant.

From the evidence, it appeared that plaintiff, with his wife and children, and about ten of his negroes, took passage on the Western & Atlantic Railroad at Atlanta, for Kingston. The negroes were paid for as *passengers*, and went on the second-class passenger-cars; that somewhere between Atlanta and Kingston, the train stopped a very short time at a wood and water station, and, upon starting, one of plaintiff's negroes (a boy about ten or twelve years old) was run over by the train and badly hurt. The train was immediately

stopped, and the boy taken in and carried on to a station above, and left. It did not appear, from the evidence, in what way he came to be run over; whether he had got out and was about getting back into the car, when it started and ran over him, or whether he was standing out on the platform or steps, and was thrown off upon the cars starting off. The testimony was somewhat conflicting, too, as to the signal given by blowing the whistle when the train moved off; some of the witnesses testifying that the train moved off before the signal was given; others, that it moved off simultaneously with the blowing of the whistle, and the Conductor of the train, and probably another, testifying that it moved off after—but immediately after—the signal was given. The Jury, under the charge of the Court, found for the defendant; whereupon, counsel for the plaintiff moved for a new trial, upon the following grounds, to-wit:

1st. Because the verdict of the Jury is contrary to the weight of evidence.

2d. Because the Court charged the Jury, that to entitle the plaintiff to recover, some negligence on the part of the defendant must be shown by proof, and that the mere fact of the injury having been done to the negro by his having been run over on the track, is not, of itself, *prima facie* evidence of negligence of defendant; and to authorize a recovery, there must be some other proof of negligence.

3d. Because the Court charged the Jury, that the liability of defendant in the case must be determined rather by the laws applicable to the carriers of passengers, than by those applicable to carriers of goods, and that defendant must have been guilty of negligence, or he is not liable.

4th. Because the Court charged the Jury, that if the place where the cars stopped, and the negro was injured, (Barrow's Station,) was a wood and water station, and not a place for passengers to get on or off the cars, then there was no necessity for the cars to stop longer than was necessary to get a sufficiency of wood and water; and especially so, as far as this negro was concerned, as he had started to go to Kingston, and had no business to get off at the station; and that to make the defendant liable, it must be shown that he was guilty of more negligence than it would have taken to make him liable, had the accident happened at a passenger depot, and not at a wood station.

5th. Because the Court refused to charge the Jury as requested by plaintiff, that to neglect to exercise authority to prevent a thing, is, in legal contemplation, to permit it; and if the negro boy was placed under the care and control of the officers of the Railroad, it was their duty, and they had the power and authority to place him in such a condition as to prevent an accident, to his injury accruing; and if they failed to do so, the Railroad is liable, and the plaintiff entitled to recover. They may not only use coercion even to chains, if necessary for the protection of property from peril, but it is their duty to do so. Humanity to the slave, as well as a proper regard for the interest of the owner, alike, demand that the rules of law regulating such transactions should not be relaxed. The imprudence of slaves demand it. They are incapable of self-preservation, either in danger or disease, and especially one of the age and size of the boy William, sued for in this action, and this duty and office devolves upon those who, for the time being, have the custody and control of the slave, and if they fail fully to perform it, then it becomes the high and solemn duty of Courts to enforce it by the only means in their power—a direct appeal to the pocket of the delinquent party.

5th. Because the Court refused to charge the Jury, as requested by plaintiff's counsel, that if the negro boy William was placed in the possession of, and under the control of the proper officers of the Railroad, and James F. Cooper, Superintendent of said Railroad, was in the car with said negro boy and permitted him to go out of the car, by which he was injured, the Railroad is liable for all the injury done to the boy and the loss the plaintiff sustained by it.

7th. Because the Court refused to charge the Jury, as requested by plaintiff's counsel, that if the cars stopped at a wood and water station, and started without blowing the whistle or giving the usual signal, having stopped a much shorter time than is usual at such places; or if the cars started simultaneously with the blowing of the whistle or giving the usual signal—starting with unusual speed—and the negro boy was injured by it, then the Road would be liable for all the injury done to the negro, and the Jury ought to find for the plaintiff.

After argument, the presiding Judge overruled the motion for a new trial, and counsel for plaintiff excepted, and assigns as error said refusal.

AKIN, for plaintiff in error.

WOFFORD, *contra*.

By the Court.—LYON, J., delivering the opinion.

The first ground of motion for new trial, that “the verdict of the Jury was contrary to the weight of the evidence,” was not argued or relied on, and is not, therefore, considered by this Court.

1. We cannot see that there is any error in the charge of the Court as stated in the second ground for new trial. The defendant, in cases of this sort, is only liable for such injuries as result from its mismanagement, neglect, or the want of due care and attention. The only question is, upon whom rests the burden of proof? And we can see no reason why it should not, in this case, as well as in all others of like character, be on him who holds the affirmative—the plaintiff. In different cases, different and various circumstances have been held sufficient to change the onus: such as the upsetting of the coach, running off the track, &c. The fact here relied on is, that the negro was a passenger, and was run over. This, in our opinion, is not sufficient, for the reason, that to have been run over as the negro was, he was, necessarily, not in the place where he ought to have been; that is, inside of the car.

2. The defendant undertook to transport the plaintiff's negro from Atlanta to Kingston as a passenger. In the transit, the negro was injured. The responsibility of the defendant for such injury to the plaintiff, “must be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods,” for the reason, as given by the books, that the slave has volition and feelings, which cannot be entirely disregarded or overlooked in conveying him from place to place. He cannot be stored away like a common package. The carrier has not, and cannot have, the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, and not a package of goods. He is, in fact, a passenger, paid for as a passenger, and so treated and held, not only by defendant, but by plaintiff.

Daniel R. Mitchell *vs.* Western & Atlantic Railroad.

The doctrine of common carriers, as to goods, does not apply to the carriage of slaves, and the carrier is not liable for the loss of, or injury to, slaves, unless the injury has been caused by the negligence or unskillfulness of himself or his agents.

3. From the statement of the charge of the Court, in fourth ground, the meaning of the Court below is not very clear; but taking the whole charge together, we think the Court meant simply to instruct the Jury: That if the train stopped for wood and water only, less care or caution on its part was necessary, than if it had stopped for the purpose of taking on or putting off passengers; and if we are right in our understanding of that charge, there was no error in the instruction.

4. There was no error in the refusal of the Court to give the charge requested by counsel for plaintiff, as stated in fifth ground of motion, for the reason, that the principles stated in that request, although sound legal propositions, when applied to the hirer of a slave, or to one who has the absolute control of the slave for the time, whose duty it is, not only to exercise proper care in the "*supervision*" of the slave, but also "to coerce him even to chains, if necessary for the protection of the property from peril." Yet, they have no relevancy, whatever, to this issue; for the defendants in the carriage of slaves, has no supervision or control of them. The slave has volition, the right of locomotion, and the defendant has no right to restrain him in the exercise thereof, by the use of chains or other violent means, unless there has been an express stipulation between the parties to do so, and this is not claimed to be the fact.

5. Neither was there error in the refusal of the Court to give the charge requested in sixth ground; because, although the Superintendent, Cooper, was in the same car with the negro boy injured, yet, there is not a particle of evidence that Cooper saw the boy go out of the car, or permitted him to do so; and while we put the decision, on this point, on this ground, we are not to be understood as holding or intimating that our decision would be different, if it was in proof that he did see the boy go out and permitted him to do so, or rather did nothing to prevent him. What I mean is, that that is a question we do not decide, because not properly before us; and it will be time enough to declare the rule when

the facts make the question. If owners desire the prohibition of a Railroad to restrain the locomotion and volition of a slave in his transportation, it is easy to stipulate for such unusual service, and then there will be no doubt as to the right and power to supervise and control his actions, while under their care and control.

6. Some evidence was offered to the Jury, on the trial in the Court below, that when the train stopped at Barrow's Station for wood and water, it started again in an unusually short time, with unusual rapidity; also, that this start was made without first blowing the whistle, or, if at all, not sufficiently long, before starting, to give warning thereof to persons in an exposed situation. If these facts be true, or either of them—of which the Jury are to judge—this is such evidence of neglect or mismanagement, on the part of defendant, as charges it with all loss or injury sustained by the plaintiff, in consequence of the cars running over the negro boy at that time, unless the defendant can affirmatively show that the injury to the boy did not result from this mismanagement or neglect, but from some other cause, and for which the defendant was wholly without blame or fault. Hence, the Court below committed error in the refusal to give the request to charge as stated in the seventh ground of new trial, with such qualification as is here stated.

Judgment reversed.

PRINCE AND STAFFORD vs. THE STATE OF GEORGIA.

A riot cannot be committed without as many as two persons acting in execution of a common intent.

Indictment for Riot, in Whitfield Superior Court. Tried before Judge CROOK, at November Term, 1859.

The plaintiffs in error were indicted for a riot. At the trial, their counsel moved to quash the indictment, on the ground that there was no averment or allegation therein that defendants committed any act in a violent and tumultuous manner, and because it is alleged that they fought, or had a fight only, which does not, in Law, amount to a riot.

The Court refused the motion, and defendants excepted.

The testimony being closed, counsel for defendants requested the Court to charge—

1st. That if the defendants are guilty of an assault and battery, or if Stafford acted in self-defence, and was justifiable in what he did, then they cannot be found guilty of a riot.

2d. That a riot is a disturbance of the public peace by the assembling together of two or more persons, with an intent mutually to assist each other, and, either with or without a common cause of quarrel, do an unlawful act of violence, or any other act in a violent and tumultuous manner.

3d. That to find the defendants guilty, the Jury must believe that they assembled with an intent, mutually to assist each other in the commission of an unlawful act, or some other act in a violent and tumultuous manner.

4th. That if the defendants assembled to fight with each other, and so fought, then the Jury should find them not guilty, under this indictment for a riot.

All of which requests the Court refused to charge, but charged that, in order to convict the defendants of riot, the Jury must be satisfied that they, either with or without a common cause of quarrel, did an unlawful act of violence, or did any other act in a violent and tumultuous manner; that this could be done by fighting each other back; but if one is not guilty, neither can be convicted. They must convict both or acquit both. The Court further defined, in the language of the Penal Code, the offence of riot.

To which charge and refusal to charge, counsel for prisoners excepted.

The Jury found the defendants guilty; whereupon, counsel for defendants moved for a new trial, on the grounds of error in the rulings, charge and refusal to charge, aforesaid; and further, because the verdict was contrary to Law and evidence, and the charge of the Court.

The presiding Judge overruled the motion for a new trial, and defendants excepted.

JESSE A. GLENN, for the plaintiffs in error.

Sol. General JOHNSON, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

We think that the facts in this case do not constitute a riot. A riot, according to the definition in our Code, is where "any two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence, or any other act in a violent and tumultuous manner." There must be as many as two persons, and they must do the same act. To be sure, it is not necessary that they should do the same act, in the sense that, what each one does, must be identical with what is done by each of the others. If so, a riot is an impossibility; for it is impossible that the action of each shall not have a certain individuality which will distinguish it from the action of all the rest. In tearing down a house, for instance, one rioter breaks down a door, and another breaks down a window, and a third merely hands a crow-bar to one of his associates. Here each one's act is different from the acts of the others, and the act of one of them has in it nothing of violence. But there is an obvious legal sense in which they all *do the same act*. The *common intent* which covers all the individual parts in the action, cements those parts into one whole, of which each actor is a responsible proprietor. The part performed by himself is his by perpetration, and the parts performed by the others *in execution of the common intent*, are his by adoption. The principle is, that each one adopts the performances of all the rest and adds them to his own, and thus *does the whole*, in the sense of the definition, so long as they are acting in execution of a common intent, but *no longer*. Hence, there cannot be a riot except where the acts of as many as two persons are cemented into one and the same act, by virtue of being done in the execution of a common intent. While, therefore, there may undoubtedly be a riot without a common cause of quarrel, or without any quarrel at all, there cannot be a riot without a common intent on the part of as many as two persons who do something in execution of that common intent. Now, the case before us is the simple one of two men fighting each other—Prince with an intent to hurt

Cobb vs. Edmondson.

Stafford, and Stafford with an intent to hurt Prince—with intents which, so far from being the same, were precisely the opposites of each other. Prince, in making the attack, was guilty of a *battery*, and Stafford, in returning it with a rock, may have exceeded a lawful measure of force, and so have been guilty of a *battery* also; but certainly they were not acting in execution of a common intent, and so were not guilty of a *riot*. For myself, I think it would be a great straining of the Statute to hold that even a pitched battle—a fight in pursuance of an agreement to fight—would constitute a *riot*. But that question is not in this case; for though there is proof of an agreement to fight, the proof is, that the fight which actually took place, was not in execution of that agreement. The agreement was, that they should go out of the incorporation and fight; but while they were going out for the purpose, Prince precipitated the fight by giving the “damned lie” and striking a blow. Stafford was overtaken by a fight not in the bargain. It may be that a riot was brewing; but if so, Prince spoiled the riot by an assault and battery. This view covers all the grounds of error.

Judgment reversed.

COBB vs. EDMONDSON.

1. Suit being brought in the name of a Trustee who is removed, his successor may be substituted upon motion, and the cause proceed.
2. A husband is not a competent witness to testify in respect to the separate estate of his wife, who is a direct beneficiary of the action, although not a party to the record.

Assumpsit, in Whitfield Superior Court. Tried before Judge CROOK, at October Term, 1859.

This was an action originally brought by Peyton L. Wade, Trustee of Mrs. Sarah A. Powell, against Jacob L. Cobb, on

husband of Sarah A. Powell, the *cestue que trust*. Defendant an account for flour sold and delivered to defendant, amounting to \$79 00.

Upon the trial, plaintiff introduced, as a witness to prove the sale and delivery of the flour, Jacob S. P. Powell, the defendant objected to the witness on the ground of incompetency, he being the husband aforesaid. (It appeared that the flour was the product of the separate estate of Mrs. Powell, of which Wade was Trustee.) The Court over-ruled the objection, and allowed the witness to be sworn. To which ruling defendant excepted.

Plaintiff having closed, defendant moved for a non-suit, upon the ground that, since the commencement of the action, Wade, the Trustee, had been removed and Edmondson appointed in his stead, but not made a party plaintiff; and that the action could not be carried on, or maintained in the name of the removed Trustee, Wade. Whereupon, plaintiff's counsel moved to amend the declaration by striking out the name of Wade, and inserting the name of Edmondson, as plaintiff.

The Court refused the motion for non-suit, and allowed plaintiff to amend his declaration as proposed, and counsel for defendant excepted.

The Jury found for the plaintiff, and counsel for defendant moved for a new trial, upon the ground of error in the rulings and decisions aforesaid, which motion for new trial the Court refused, and counsel excepted and assigns said refusal as error.

M. CUTCHEON, for plaintiff in error.

JESSE A. GLENN, *Contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It was no error in the Court, to substitute, upon motion, the name of the new Trustee, in the place of the former Trustee—Peyton L. Wade—any more than it would be one *prochein amy*, or guardian *ad litem*, in lieu of another, which is the every-day practice. The Act of 1859 expressly authorizes it. It was the Law before.

As to the second error assigned, we are clear that Mr. Powell, the husband, was not a competent witness to testify,

McGinnis vs. Chamberlain, Miller & Co.

in respect to the separate estate of his wife, although she was not the party to the record, but yet the direct beneficiary of the suit; and all the authorities concur upon this point. (1 *Greenlf. Ev.* § 341. 1 *Burr*, 424; 4 *F. Rep.* 678; 5 *Beav.* 443; 6 *Bin.* 483; 2 *Stark on Co.*, Part 1. 550, 551.) He is excluded, not so much on the score of interest and the temptation to commit perjury, but upon a great ground of public policy—the preservation of domestic peace and conjugal confidence.

For admitting the evidence of Mr. Powell, the husband, the Judgment of the Circuit Court must be reversed.

MCGINNIS vs. CHAMBERLAIN, MILLER & CO.

1. N. McD. applied to S. McG. to become his security on a note to C. M. & Co. not naming any amount; McG. replied by letter, authorizing McD. to sign his name to such note as security. Suit afterwards being brought on this note. McG. plead *non est factum*. On the trial of that issue, it was proper for the Court to let the note be read to the Jury on proof of a conversation between McD. and McG., in which McG. distinctly admitted writing the letter giving the authority to McD. to sign his name. &c., and, on the further admission by McG., that McD. was, by the permission and consent of McG., in the constant habit of signing McG.'s name as security for him whenever he chose to do so.
2. The Jury having returned a verdict against McG. on this proof, such verdict was not so decidedly against the weight of evidence as to require the Court to grant a new trial.

Complaint, in Gordon Superior Court. Tried before Judge CROOK, at October Term, 1859.

This was an action by Chamberlain, Miller & Co., of Charleston, South Carolina, against Newton McDill, principal, and Stephen McGinnis, security on a promissory note

McGinnis vs. Chamberlain, Miller & Co.

for \$1,168 00, payable eight months after date, and dated Charleston, South Carolina, June 11th, 1856.

McGinnis defended the action, and pleaded the general issue, that he never signed said note, which plea he verified by his oath.

Plaintiffs read, in evidence, the deposition of Charles H. Smith, who testified that he had the note sued on in his possession, and first had a conversation with McGinnis about the winter of 1857-'58. Told him the note would soon be due; he asked, "What note?"—witness told him the note he had signed with McDill to plaintiffs, for \$1,168 00. McGinnis said he never signed any such note. The next day, witness went with McGinnis to McDill's house, and witness asked McDill how came McGinnis' name to that note. McDill said he signed it for McGinnis. McGinnis said, "Newton, how came you to do so?" McDill replied, "Why Stephen, you wrote me to do it." McGinnis replied, "No, I never." McDill said, "Why, Stephen, I've got your letter now, and you know you wrote me to sign your name to that note." McGinnis said, "I know, Newton, you wrote me that you could get further time on the Charleston debt, if I would sign with you, but you never named such an amount as that. I thought it was some debt of two or three hundred dollars, and I wrote you to sign my name." McDill said, "Well, Stephen, I did not write you any amount at all, and you know I've been signing your name, for several years, as my security whenever I needed security, and you know you authorized me to do it, and you never objected before." McGinnis said, "Well, Newton, that's so, but things are *squally* now, and I am going to swear off every one I can. I don't intend to pay this note—I am going to take care of myself."

Plaintiffs then offered, in evidence, the note sued on, to the introduction of which defendant objected. The Court over-ruled the objection, and admitted the note, to which ruling defendant excepted.

The case was submitted upon the foregoing testimony, and the charge of the Court, and the Jury found for the plaintiffs the amount of the note; whereupon, counsel for McGinnis moved for a new trial, upon the grounds, that the verdict was contrary to Law and the evidence, and the charge of the Court, and because the Court erred in admitting the note in evidence under the facts and proof.

McGinnis vs. Chamberlain, Miller & Co.

The presiding Judge refused the motion for a new trial, and counsel for McGinnis excepted.

DABNEY, for plaintiff in error.

COOPER, *Contra*.

By the Court.—LYON, J., delivering the opinion.

1. Whether Newton McDill was authorized to sign the name of plaintiff in error to the note sued on, as security for the said McDill, so as to charge the plaintiff in error with payment, was a question for the consideration of the Jury solely. That was the issue that they were to try. The evidence of Charles H. Smith, read to them on the part of defendant, in support of that proposition, was sufficient to let the note go to the Jury to be considered by them in connection with that evidence. The Court below, therefore, properly over-ruled the objection to its admissibility.

2. Was the verdict strongly and decidedly against the weight of evidence? We think not. In the conversation that occurred between McDill and plaintiff in error, in the presence of the witness—the note in controversy being before the parties—McDill said to plaintiff in error: “Why, Stephen, I’ve got your letter now, and you know you wrote me to sign your name to *that note*”—the one in suit—to which McGinnis replied, “I know, Newton, you wrote me that you could get further time on the Charleston debt if I would sign with you, but you never named such an amount as that. I thought it was some debt of two or three hundred dollars, and *I wrote you to sign my name.*” Here was a plain, open, and unqualified admission that McDill, the principal, had made application to him to sign his name to this identical debt, for the purpose of getting further time on it, and that he had authorized McDill to sign his name thereto. How much stronger evidence could have been given of McDill’s authority to make the signature? It is true, that McGinnis said, in giving that authority, that he thought the debt was a much smaller one, but he did not pretend that he made any such limitation, or qualification, in his written authority to sign his name to that note. And if he honestly thought at the time, that the debt was a much smaller one,

Ware vs. Craven.

such thought can not save him from the effect of an open and unqualified authority to McDill to make the signature for him. But the testimony does not end here. McDill replies to McGinnis, "Well, Stephen, I did not write you any amount at all, and you know I've been signing your name for several years as my security, whenever I needed security, and you know you authorized me to do it, and you never objected before." McGinnis said, in reply to this whole statement, from beginning to end, "*Well, Newton, that's so,*" &c.

One of the tests for determining whether a signature to a paper of this kind is authorized or not, is this: Would the party actually signing the name of the third person, in an indictment, be guilty of forgery? Try this case by that test, and would it be possible to legally convict McDill of forgery in signing the name of McGinnis to that note, as his security on the same? No one would, for a moment, hesitate in saying that he could not be—and why? Because McGinnis authorized him to do so. Yet it is either McGinnis' act, and must be so treated, or McDill is guilty of forgery. In any point of view that we look at this case, the verdict of the Jury is not strongly and decidedly against the weight of evidence, but it is well supported by the evidence, and any other verdict would have been against the evidence.

WARE vs. CRAVEN.

- The verdict is supported by the evidence.
- In order to obtain a *certiorari* from a Justices' Court, the facts stated in the petition need not be verified by affidavit.

Certiorari, in Gordon Superior Court. Decision by Judge CROOK, at October Term, 1859.

R. W. Craven brought suit in a Justices' Court, against

Ware vs. Craven.

E. P. Ware, guardian of Miss Eliza Applebey, a minor, on an account for work done and services rendered as a dentist, for Miss Applebey. At the first trial in the Justices' Court, plaintiff recovered judgment for the amount of his account. The defendant appealed, and upon the trial on appeal, the same testimony offered on the first trial was again submitted, to-wit: The affidavit of plaintiff, in support of his account, and the counter-affidavit of defendant, as provided by Law, in cases where the plaintiff in suits in Justices' Courts resides out of the county in which the suit is brought: the plaintiff here residing in the county of Cass, and the defendant in the county of Gordon. Plaintiff further offered and read in evidence the depositions of Mr. and Mrs. Chum, who proved that Miss Applebey was boarding at their house at the time the work was done; that she was suffering very much with her teeth, and at her request, plaintiff was sent for, and executed the work for her, which is charged in the account sued on; that Miss Applebey said at the time, that it was her mother's wish that her teeth should be plugged; she did not complain of her teeth afterwards, and are of opinion that she was benefitted by having her teeth plugged.

Upon this proof, the Jury found for the defendant. Whereupon, plaintiff applied for, and sued out, a *certiorari* to have said verdict reviewed and set aside, upon the ground that the same was contrary to the evidence.

At the trial before Judge Crook, counsel for Ware moved to dismiss the *certiorari*, upon the ground that plaintiff had not made affidavit of the truth of the facts set forth in his petition for *certiorari*, as required by Law. The Court overruled the motion, holding that the affidavit made was sufficient. To which ruling counsel for Ware excepted.

The Court further held, that the verdict was contrary to the evidence, and ordered the same to be set aside, and that a new trial be had. To which decision counsel for Ware excepted.

G. J. FAIN, for plaintiff in error.

PHILLIPS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. We do not agree with the presiding Judge, that this verdict in favor of the defendant in the Justices' Court is against the evidence. The only evidence which the plaintiff there had to carry it the other way, was his own affidavit, and the testimony of Mr. and Mrs. Chum. As to his own affidavit, it was met by a counter-affidavit by the defendant, and no reason is shown in the case why the Jury should not have believed the defendant rather than the plaintiff. As to the testimony of Mr. and Mrs. Chum, it covers only one point among several, which were necessary for the plaintiff to establish, in order to recover. They state that he did the work, and that it relieved the young lady's toothache. This is the whole proof. Now, aside from his own affidavit, which the Jury considered to be overcome by the counter-affidavit of the defendant, the plaintiff had no proof as to how much the work was worth, and none to show that the work was suitable to the young lady's estate and condition in life—the suit being against her guardian. It was said that any girl, with or without an estate, has a right to get relieved of a toothache and make her guardian pay for it. If this doctrine is conceded in favor of gallantry, (and it can hardly be conceded on any other score,) still, some care must be taken not to make the guardian pay for anything but relieving the toothache. Now, it is very possible that the toothache, in this young lady's case, could have been relieved as the toothache of her grandmother had, no doubt, often been relieved, by a plug of cotton, with a little laudanum on it, instead of fine plugs of gold. We think the Jury were authorized to find the verdict which they found.

2. We do not think that there was any necessity to verify, by affidavit, the statement of facts in the petition for *certiorari*, in order to obtain the writ; and we concur with the Judge, in his refusal to dismiss the *certiorari* for the lack of such an affidavit.

Judgment reversed.

MADDOX vs. BOSWELL.

A physician who was practicing at the date of the Act of 1847, which revived the Act of 1825, to regulate the licensing of Physicians in this State, &c., is a qualified physician, and may collect his account for medical services.

Complaint, in Catoosa Superior Court. Tried before Judge CROOK, at November Term, 1859.

This was an action by Doctor George B. T. Maddox, against William M. Boswell, on an account for board and medical services, rendered by plaintiff for defendant.

The defendant pleaded the general issue, and that plaintiff was not a practicing physician, entitled, by Law, to charge and recover for the services rendered, never having obtained a license to practice, as required by Statute, in such case made and provided.

At the conclusion of the testimony, plaintiff's counsel requested the Court to charge the Jury: That if the plaintiff was a practicing physician at and before the passage of the Act of 1847, and up to that time, (the time of trial,) and has proved his account, then he is entitled to recover. Which charge the Court refused to give, but charged: "That the Act of 1847 revived the Act of 1825, and excepts from its operation the graduates of Botanic Medical Colleges, and the licentiates of a legally established board of physicians; and although plaintiff was practicing medicine before the Act of 1847, he could not recover, unless he came within the exception of that Act," &c.

The Jury found for the plaintiff \$71, being the amount of items in the account, other than for medical services. Whereupon, counsel for plaintiff moved for a new trial, on the ground that the verdict was contrary to Law and the evidence, and that the Court erred in its charge, and refusal to charge, as above stated.

The Court overruled the motion for a new trial, and plaintiff excepted.

CARUTHERS; DODSON, for plaintiff in error.

SUTTON; J. A. GLENN, *contra*.

Maddox vs. Boswell.

By the Court.—LYON, J., delivering the opinion.

The only question in this case is, Whether the plaintiff, as an unlicensed practicing physician, has a right to sue for, and recover that part of the account declared on, which is made up of professional services rendered defendant, on proof of the same—he (the plaintiff) having been a practicing physician at the date of the Act of 1847, reviving the Act of 1825, to regulate the licensing physicians in this State?

This identical question was made and decided affirmatively by this Court in *Newsom vs. Lindsey, adm'r*, 21 Ga., 365.

We see nothing in the present case to induce a change of the construction of those acts given by the Court in that case. For my own part, I would not consent to a change of that construction, were I convinced that it was an erroneous interpretation of the Law, for the reason, that I believe it is the true policy of this Court, as well as the spirit in which it was organized by the people of Georgia, that a principle once decided, that is not in conflict with a Statute of the State, should stand as Law, and be conclusive in all subsequent adjudications and judicatories in this State, until repealed or changed by the Legislature of Georgia.

And as the charge of the Court below to the Jury on this question, and his refusal to charge as requested by counsel for plaintiff, was directly in conflict with that decision, the judgment must be reversed on that ground. The Court should have charged the Jury as requested.

Counsel for defendant insisted, that to entitle the plaintiff to the benefit of the exception, it was necessary for him to show, by proof, that, although a practicing physician, he fell within some one of the different schools or classes of practitioners expressly named by some one of the several Statutes on this subject. The Statute makes no such distinction. To recover for his services, he must show that he was "a practicing physician" at the passage or revival of the Act of 1825. If he does that, no matter what school or class he belongs to, he is within the exception, and entitled to recover.

Judgment reversed.

Neal vs. Wm. N. & Wright Bookout.

NEAL vs. WM. N. & WRIGHT BOOKOUT.

- 1 The preliminary issue authorized by the Act of 1855-'6. to traverse the truth of the affidavit in relation to the ground upon which the attachment issued, must be tendered at the return Term of the attachment.
- 2 Where the issue traversing the truth of the ground upon which the attachment was issued, was tendered at the trial Term of the attachment, and disallowed by the Court, an appeal upon the merits, does not carry up this preliminary question.

Attachment, in Gordon Superior Court. Tried before Judge CROOK, at October Term, 1859.

Thomas Neal sued out an attachment against the defendants, the Bookouts, on the ground that they abscond. The debt sued for was a promissory note for \$295, and the attachment issued the 18th May, 1857, returnable to the July Term, 1857, of the Inferior Court of Gordon county. At that Term of the Court, nothing was done, except the filing of the declaration, as provided by Law. At the January Term, 1858, the defendants appeared and traversed the ground upon which the attachment had issued, to-wit: that they "*abscond.*" At the same Term of the Court, and without trying the issue presented by the traverse, the defendants confessed judgment to the plaintiff, for the amount of the note sued for, reserving the right of appeal. Upon the trial on the appeal, the Jury found "against the issuing of the attachment." This verdict was rendered at the October Term, 1859, of Gordon Superior Court. Whereupon, plaintiff moved for a new trial, upon the following grounds, viz:

1st. Because the Court erred in allowing the traverse of the ground on which the attachment issued—said traverse not having been filed at the Term to which the attachment was returnable. (The traverse was allowed by the defendants swearing, that, being absent from home at the time of suing out the attachment, and at the return Term of the same, they had no knowledge of the existence of the attachment, and that was the reason why the traverse was not filed at the return Term thereof.)

2d. Because the Court erred in charging the Jury, that if, from the evidence, they believed that the defendants, Bookouts, were just gone from home at the time of suing out the

attachment, to sell some property, and left their land, families and other property in the county of Gordon, having a residence in the county of Gordon all the time, that they might find the issue in favor of the defendants.

3d. Because the Court erred in charging the Jury, that if, during the absence of the defendants out of the County or State, the plaintiff could have had legal service perfected by leaving a copy of a declaration and process at the most notorious place of abode of the defendants, and that their land, families and other property remained in Gordon county, that then they would be authorized to find the issue in favor of the defendants.

4th. Because the Court erred in charging the Jury, that if, from the evidence, they believed that defendants did not leave Gordon county with a view of avoiding the service of ordinary process upon them or secreting themselves, but only left for the purpose of selling their stock, and not changing their residence, they would be authorized to find the issue in favor of the defendants.

5th. Because the Court erred in ordering the attachment dismissed upon the finding of the Jury, notice having been served upon the defendants after their return, but not within ten days of said judgment.

6th. Because the finding of the Jury in said case is strongly and decidedly against the weight of the evidence.

The Court overruled the motion for a new trial, on all the grounds therein taken, and counsel for plaintiff excepted.

MILSER and PHILLIPS, for plaintiff in error.

FAIN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The thirty-first section of the Attachment Act of 1855-'6 declares, that it shall be lawful for the defendant in attachment to traverse the truth of the affidavit, in relation to the grounds upon which the attachment has issued, "*at the return Term of the attachment*;" and the issue thus formed is to be tried at the first Term, unless good cause be shown for a continuance, and either party being dissatisfied with the verdict, is entitled to appeal. (*Pamphlet*, p. 33.)

Neal vs. Wm. N. & Wright Bookout.

Can the traverse thus authorized be allowed at any other than the return Term of the attachment? We think not. Nor does this construction of the Statute work any serious detriment to the defendant. He may still come in and defend the case upon the merits.

But in this case, there is, we apprehend, a fatal objection to the proceeding. The attachment was returnable to the July Term, 1857, of the Inferior Court. At the trial Term, in January thereafter, the traverse was tendered and disallowed by the Court; and thereupon, the defendant confessed judgment to the plaintiff *for his debt*, reserving the right of appeal, which was duly entered. But this appeal did not, of course, take up the traverse. It remained where it was left in the Court below, no *certiorari* being sued out to reverse the judgment of the Inferior Court, in refusing to allow the traverse to be filed at the appearance Term of the attachment, and no attempt being made to carry it up by appeal. For, we repeat, the defendant did not confess for the debt; and further, that *he absconded*, with liberty of appeal, but for the debt only.

How does this issue come up, then, and be treated as upon the appeal? The whole proceeding was *coram non judice* and void.

This being so, it is useless to consider the charge of the Court. The case must be reinstated, and a trial had upon *the merits*—upon the appeal. It is too late to take up and try the preliminary question, as to whether or not there was ground for the attachment.

Judgment affirmed.

JONES vs. THE WILLS VALLEY RAILROAD CO.

1. *The State vs. Dean*, 9 Ga. Rep., 400, and *Armstrong vs. The Oglethorpe Bridge & Turnpike Co.*, 18 Ga. Rep., 609, reaffirmed.
2. It would seem, that where the land of a citizen is taken to build a Railroad against his will, he should be paid its value, *in coin*, according to quality, form and location. But if the owner sets up a claim for apprehended evils and inconveniences, the incidental benefits which he receives from the location of the Road upon his property, should be allowed, by way of reduction of the damages so claimed.

Assessment of Damages, in Dade Superior Court. Tried before Judge CROOK, at June Term, 1859.

This was a proceeding to assess damages sustained by James H Jones, for, and on account of, the right of way for the construction of a Railroad through his land.

Upon the trial on the appeal, counsel for Jones (the Railroad being the appellant) moved to dismiss the appeal, upon the ground that the same was not taken within the time prescribed by Law. The Statute providing "That the award of a majority of the appraisers, in writing, shall operate as a judgment for the amount against the Company, and shall be enforced by an execution from the Inferior Court, with the right of appeal to either party, to be tried by a special Jury as other appeals, at the next Term of the Superior Court thereafter." That the award, in this case, was made in writing, and signed by the appraisers on the 15th day of November, 1858, and the appeal was not entered until the 14th day of December thereafter, which being more than four days from the date of the award, rendered said appeal illegal. The Court refused to dismiss, and plaintiff, by his counsel, excepted.

Plaintiff then proved by the Chief Engineer of the Company, the location of the Road through his land, and the appropriation therefor of two acres of his land; that there would be an embankment through plaintiff's field, varying from two to nine feet high.

ZACHARIAH O'NEAL sworn, testified, that he thought the land damaged \$800.

Mr. DEARBERRY testified, that he thought the land was damaged \$800 or \$1,000.

Jones vs. The Wills Valley Railroad Company.

B. F. PACE thought the land damaged \$1,200.

HUGH L. W. ALLISON thought it damaged \$400 or \$500, and also, that the land was worth as much after, as before, the Road was built.

Plaintiff here closed, and defendant introduced no evidence.

After argument, counsel for the Road requested the Court to charge the Jury—

1st. That the fact of the defendant being a corporation, should have no influence on their minds in making up their verdict, but that they should decide and find on the same principles as if the case was one between man and man.

2d. That the question to be determined was, how much damage the plaintiff had sustained by the appropriation of his land for the purposes of the Road? And in the determination of this question, the Jury must deduct from the amount of damages the enhanced value of the remainder of the land, caused by the construction of the Road.

3d. That, if the plaintiff's land is worth as much with the Road upon it as it would be without it, he is not entitled to recover any damages.

4th. That all the defendant is required to do is, to make just compensation for the land appropriated, and is not bound to do so in money, but may do so by enhancing the value of the remainder of the land.

5th. That if the Jury think, from the evidence, that plaintiff is not, in fact, injured, they must find for the defendant. That the great question is, has the plaintiff been damaged, and if so, how much?

6th. That if, from the testimony, the Jury believe that plaintiff's land, without the contemplated Road, was worth, for instance, \$2,500, and after the appropriation of a certain amount for the right of way, the remainder, by reason of the Road, is worth as much as the whole without the Road, say \$2,500, then plaintiff is not entitled to recover anything.

7th. That the burden is on the plaintiff to show that he is damaged; and although he may not be as much benefitted as his neighbor through whose land the Road may not pass, this is no reason why he should have damages from the defendant.

8th. That the *fee-simple* to the land, which defendant acquires by virtue of their decision, is no more than the right of way for the construction of the Road.

9th. That the award made by the arbitrators in the case is to have no influence with them in making up their verdict.

10th. That the Jury are to consider the question of the value of the land as if the plaintiff wished to sell, and defendant wished to buy. That the Road is not to be considered a wrong-doer, but as a fair purchaser in the market.

All of which the presiding Judge charged as requested, and to all of which counsel for plaintiff excepted.

The Jury found for the plaintiff three hundred dollars.

And counsel for plaintiff, therefore, tender their bill of exceptions, assigning as error the rulings and charge aforesaid.

ROBERT H. TATUM, for plaintiff in error.

By the Court.—LUMPKIN, J., delivering the opinion.

As to the appeal, not having been entered in time, the first point made in the bill of exceptions, that point is settled against the plaintiff in error, in *Armstrong against The Oglethorpe Bridge & Turnpike Company*, (18 Ga. Rep., 609;) and *The State vs. Dean*, (9 Ga. Rep., 400.)

The main question to which our attention has been called by the learned counse is, What shall be the rule in estimating the damages to be assessed against the Wills Valley Railroad Company for seizing and appropriating the land of the citizen for the construction of their Road? He insists that the rule prescribed by the Supreme Court of Tennessee, in the case of *Woodfolk against The Nashville & Chattanooga Railroad Company*, (*American Law Register*, July number, 1853,) and sustained by several adjudications in Kentucky, (5 Dana, 28; 7 id., 81, and 9 id., 114. But see *contra*, 3 Moss. Rep., 489; 4 Cush., 471,) is the true criterion of compensation; and that is the fair cash value of the land taken for public use, if the owner were willing to sell, and the Company desired to buy, that particular quantity, in that place and in that form, would be the measure of remuneration; and that this must be paid in money.

For myself, I confess I am strongly inclined to maintain this. But the Tennessee Court further held, and, I think, correctly, too, that if the owner of the land seeks to recover incidental damages beyond the actual value of the land taken, the Road has a right to set-off a counter-claim for the in-

Jones vs. The Wills Valley Railroad Company.

creased value of the land, by reason of the location of the Road on the plaintiff's property.

All our Railroad charters contain this principle; and by irresistible implication, it is embraced in the charter of the Wills Valley Road; for it provides expressly that the land-owner is not, by the assessment of damages, to be brought in debt to the Road—a result which is only possible, by setting off the benefits against the injuries.

The verdict in this case was clearly contrary to the evidence; but as no motion was made for a new trial, the case cannot be sent back, on that account. But there is a ground upon which a rehearing can be awarded: The witnesses, in testifying to the increased value of the land, do not *state*, whatever they may have *intended*, that it was owing to the location of the Road. We know that there is not an acre of ground in the State, nor a foot of land in any of our cities, towns or villages that has not steadily appreciated in value for the last ten years. To have warranted the instructions of the Court to the Jury, it should have appeared, affirmatively, that the enhancement in price was attributable to the Road, or at least, to what extent the Road had contributed to produce this result.

We think that the ends of Justice would be best subserved by sending this case back, with the opinion of this Court, by way of directions, that the Jury first ascertain the value of the property appropriated by the Road, add to this the damages which would result from its construction; the latter to be set-off by the benefits conferred. If the latter equal the former, the verdict to be for the actual value only of the property used; if less, the difference to be added to the price, and that, too, although the Road should never be built. For it is the duty of the defendant in error to complete it, and put it, and keep it in operation; and the fault will be at the door of the Company, if it be left unfinished.

The subject is one of difficulty and delicacy. It would seem that where the private property of a citizen is taken against his wish and will for a Railroad, he should be paid its value in coin. If the owner, however, sets up a claim for apprehended evils and inconveniences, it may not, perhaps, be going too far to allow, by way of reduction for the damages so charged, all the incidental benefits which he receives from the location of the Road upon his premises. This ap-

McGinnis vs. The Justices of the Inferior Court of Gordon County.

proximates, as near as possible, the meeting out of Equity to all concerned. To lay down a rule or draw a line, with mathematical precision, is impossible.

McGINNIS vs. THE JUSTICES OF THE INFERIOR COURT OF GORDON COUNTY.

1. An injunction will not be dissolved on the coming in of the answer, unless the answer fully swears off or denies all the equities of the bill, especially when the injunction is necessary to protect the complainant from an invasion or trespass upon his property.
2. Where a general demurrer has been heard and adjudicated, the Court will not, on a motion subsequently made to dissolve the injunction on the coming in of the answer, consider any objection to the bill that was properly involved in the demurrer.

In Equity, in Gordon Superior Court. Decision by Judge Crook, at Chambers. January. 1860.

This was a bill filed by Stephen McGinnis, against the Justices of the Inferior Court of Gordon County, to enjoin them from pulling down and removing the toll gates erected by complainant across the public highway, at his bridge, over the Oostanaula river, and to enjoin and restrain the collection of an execution issued against complainant by the Commissioners of Roads, under the order and authority of said Justices, to enforce the payment of a fine imposed upon complainant for the erection of said toll-gate; said fine being imposed upon the pretence that said gates are unlawful obstruction of a public highway. The bill alleges that the premises upon which said bridge and toll-gates are erected, is the property of complainant, and that he purchased the same with said bridge and toll gates, as appurtenant and belonging thereto, and established and recognised by the Superior Court of said County, as a toll bridge, with the right and authori-

McGinnis vs. The Justices of the Inferior Court of Gordon County.

ty of complainant to exact and receive toll, according to a rate established by said Court.

To this bill defendants demurred, and, upon argument, the Court overruled the demurrer, and ordered defendants to answer.

Upon the coming in of the answer, defendants moved to dissolve the injunction. After argument, the Court granted the motion, and dismissed the bill, upon the ground that there was no such case of irreparable injury, by the trespasses complained of and threatened, as entitled complainant to the interposition of a Court of Equity, and that said injunction had been improvidently granted.

To which decision, counsel for complainant excepted and assigns the same as error.

SHEPPARD, JOHNSON, & PHILLIP, for the plaintiff in error.

DABNEY & FAIN, *contra*.

By the Court.—LYON, J., delivering the opinion.

The complainant filed this bill returnable to the October Term, 1858, of Gordon Superior Court. At that term the defendants to the same appeared and put in a general demurrer for the want of Equity, and after argument had, the Court overruled the same at that term. From this judgment no appeal or exception was taken by defendants, but they then put in their answer, and at the April Term, 1859, moved to dissolve the injunction on the ground that the Equity of the bill was fully denied by the answer. Upon this motion, the Court "dissolved the injunction and dismissed the bill, on the ground that there was no sufficient allegation of irreparable mischief, to restrain the trespass, and that the injunction was improvidently granted."

This judgment we are called on to review, and it is insisted by counsel for defendants, that, although the Court below may have improperly dismissed the bill, and dissolved the injunction on the wrong ground, or for a wrong reason; yet, as the true question before the Court, was a motion to dissolve the injunction on account of the denial of the Equity of the bill by the answer, so, that is, or ought to

McGinnis vs. The Justices of the Inferior Court of Gordon County.

be, the true question before this Court; and if we should be satisfied that the answer fully denies all the Equities of the bill, then this Court ought, at least, to affirm that part of the judgment which dissolves the injunction. Agreeing as we do with the counsel for defendant in this respect, we shall consider the judgment under review in that aspect. Then, does the answer fully deny all the Equities of the bill?

The Equities of the bill are, that the Inferior Court of Gordon County, being the owners of that part of lot No. 191, in the 14th district and 3rd section of said county, on which was situated the bridge across Oostananla River, built by Washington Lawson, having purchased the same at sheriff's sale as the property of said Lawson under executions against him, did on thirty-first day of October, 1855, sell the same to one Newton McDill for the sum of \$1,500, which has been fully paid to the Inferior Court of Gordon County, the whole of which has been received and appropriated to the use and benefit of the County of Gordon; that to induce McDill to make that purchase, the then said Inferior Court represented to him that the tolls from the bridge would yield him the net sum of \$100 per month; that the said Court would establish the road-crossing on and at that bridge as a public highway, and they as a Court would by its order vest in him the right to charge toll on all persons crossing, at a tariff of tolls to be fixed by the Court; that McDill did purchase on these representations and inducements; that the Inferior Court in compliance with their agreement, and in execution of this contract, did on the same day of the sale pass an order of that Court changing the road leading to Lawson's ferry, so as to cross on that bridge, and authorizing McDill to establish the rates of toll on said bridge, said order being subsequently amended so as to read "and the same is made a public highway from the time of Newton McDill's" purchase from the Inferior Court; and in this amended order the rates of toll were fixed and prescribed by that Court for all crossing on the bridge with this single qualification, that persons hauling grain or desirous of trading in Calhoun would be charged but half price. That three of the members of the Court on the day of sale gave to McDill their bond to execute titles to him or his assigns on the payment of the purchase money, for the faithful performance of which they not only bound themselves individually, but also

McGinnis vs. The Justices of the Inferior Court of Gordon County.

their "successors in office as Justices of the Inferior Court of Gordon County," and in that bond to make titles the land sold was not only particularly specified, but also "together with the bridge which stands thereon;" that subsequently on the 26th day of January, 1857, the Inferior Court transferred their bid at Sheriff's sale of the premises to McDill, and directed the Sheriff of Gordon County to make titles to him, and that the Sheriff did so. That complainant subsequently purchased the premises, including the bridge, and that he now in all respects occupies the place in the contract that McDill held, and is possessed by virtue thereof with all the rights and Equities that McDill had. That now, notwithstanding the clear rights of complainant under the aforesaid statement of facts, the present Inferior Court, in the face of the solemn contract and obligations of their predecessors, and of their express grants, all of which appear on the minutes of the Court, and are exhibited to the bill, they are using their offices as Justices of the Inferior Court to disturb complainant in the full and free use of his premises, and the exercise and enjoyment of his rights under said contract, and grants from the Inferior Court, by causing his toll-gates to be torn down as obstructions in the highway, and to coerce him by fines, threats, lawsuits, and penalties under color of their office, and without authority of law, and against right, to permit the citizens of Gordon County to pass over his said bridge free of toll.

The defendants, in reply, after admitting that they know nothing of the representations made to McDill, or of the inducement held out by their predecessors to McDill to buy the premises, deny that their predecessors sold the premises to him as the Inferior Court of Gordon County for \$1,500, or any other sum, or that they as a Court bid off the premises; but if they did buy or sell the premises to McDill, they did so as individuals, and not as a Court as they, defendants, are unable to find on the minutes of the Court any order authorizing such purchase or sale, and this is the whole extent of their denial. Do they deny that their predecessors in the purchase of the lands at Sheriff sale, and in its subsequent sale to McDill acted in their representative character for the benefit of the Court of which they were members, and of the county which they represented, or that they in doing so made the representation, and held out the inducements to McDill as

charged in the bill? Do they deny that the Court and the County got the full benefit of the entire operation; that they got the purchase money? These facts are not denied by the answer, yet, they constitute the very gravamen of the bill. Besides an examination of the bond given by three of the members of the Court, to-wit: Fain, Swaggerty and King, on the 31st of October, 1855, as well as the order of that Court on the same day, the subsequently amended order, and transfer of the bid of the Inferior Court to McDill, must satisfy any impartial inquirer in the absence of other proof that the allegations of the bill are true. The land on one side of the River was bid off by Stephen T. Mays, a member of the Court, who does not join in the bond; that on the other side was bid off by Swaggerty. Now, if they bought as individuals, and not as a Court, why did not Mays join in the bond, and why did Fain and King, who were not purchasers give their bond? Again, if it was an individual transaction, why did these persons in addition to personal obligation, also stipulate for their successors in office as Justices of the Inferior Court? Then, again, why did these orders of the Court follow so simultaneously with the contract and sale, if not in execution of the contract as charged, and as a part of the same? To all these inquiries, and they are fairly presented by the bill and exhibits, the answer makes no response, nor offers any explanation whatever.

It appears from the answer, that when Lawson projected the building of this bridge, the Inferior Court for the purpose of securing a free passage for the citizens of Gordon County across the bridge, at first subscribed and paid to Lawson \$500, in consideration of which sum, Lawson agreed that the citizens of Gordon might pass over the bridge; that subsequently as the bridge advanced Lawson, from his embarrassments, was about to fail with the bridge, and the Court to prevent such failure, borrowed from G. P. King \$3000, on the note of the county, and paid it over to him to aid in the building of the bridge, which sum was to be refunded to the Court when collected from subscriptions, and that the Court again contributed \$500 more to aid him in repairing a damage done to the bridge by freshet, making in all about \$4000, that the County of Gordon, through its Inferior Court, had invested in this bridge, while in the hands of Lawson, to enable him to complete it so as to secure to the citizens the free

McGiannis vs. The Justices of the Inferior Court of Gordon County.

use of the bridge. Right here the defendants plant themselves on the proposition, that under this contract with Lawson, and in consequence of these different investments and contributions to secure this object, the citizens of Gordon County acquired a vested right to pass over the bridge free of toll for all time to come into the hands of whomsoever it might come, that could not be divested by the Sheriff's sale of the same under an execution against Lawson of a lien of junior date to this contract, and this is a sound proposition, but it does not meet the facts of this case. The complainant's right to relief does not depend on a denial or abridgment of the principle involved in that proposition. The citizens of the county acquired this right under a contract of the Inferior Court, as their representative, with Lawson. So long as the bridge remained in the hands of Lawson, and all others holding under him with notice, this vested right attached to it, but when the land, and of course the bridge resting on it, was sold, and the Inferior Court became the purchaser, the two interests—that is, the bridge itself, and the right of the citizens to pass over it free of toll—united and became one undivided interest belonging entirely to the county; the one interest as much as the other, and the Inferior Court had the same right to part with one as the other, and the whole as much as a part. And the bill in effect charges this to be the case. It was through the contract of the Inferior Court that the citizens acquired the right, and it was by the contract of the Inferior Court with McDill, that this right was parted with by the citizens and not by the Sheriff's sale.

The Sheriff's deed to Newton McDill recites the fact, that this property was bid off on the first Tuesday in September, 1855, at the sum of \$2,355; that is, that the creditors of Lawson realized from that sale only that amount for all that property. I take it from this, that the Inferior Court bid off the property at that price. Now, if this is the fact, there is one view of the case that surely neither the present Inferior Court, or the citizens of Gordon County, have taken of this transaction, or that sense of justice and right, which ought to animate and control the action of all tribunals as well as of individuals, would have impelled a more charitable feeling and conduct towards the complainant and his right in this property.

That sum, \$2,335, was the bid of the Inferior Court; that is what they paid for the property, but McDill paid them \$6,500, being \$4,165 more than it cost at Sheriff's sale, and this large sum of money has been actually received by the County from McDill. What could have induced him to pay the Inferior Court so much more for the premises than they paid for it? The bill says that it was paid on the faith of the promises and agreement of the Inferior Court, that the bridge should be a general toll bridge, &c., and this is not denied by the answer. Now, the Inferior Court had contributed \$4,000, as has already been shown towards the building of the bridge for the purpose of securing to the citizens a free transit over the same, when \$500 was considered by them and Lawson in the first place as sufficient for that purpose. When Lawson became insolvent, and the property was seized for his debts it must have become apparent to the Court that the \$3,000 borrowed of Mr. King would certainly be lost to the County, and possibly the right of the citizens to the use thereof free of toll if the land and bridge on it should be bid off by, and pass into the hands of, a stranger. Is it not fair to suppose from all the facts of the case, that the members of the Court to prevent so great a loss to the County, as such a result would have been, stepped in at that sale and became the purchasers of the whole property for the use of the County? When they had done so the County had invested \$6,335 in the property. Now, is it not more than likely that the Justices of the Inferior Court at this point came to the conclusion that they were paying too much for the intended benefit, the mere right of the citizen to cross on the bridge free of toll? It had cost them more, much more than they contemplated; more probably than their constituency would approve, and governed by the desire to promote the best interest of the County determined to sell the whole property with no other reservation than such is made in the order appended as an exhibit to the bill, and from the sale refund to the County all that had been contributed for that purpose. Whether these motives actuated the Court in that sale or not, it is very clear that they in fact did then part with the land and bridge to McDill, and whether from design or inadvertence they failed to reserve the right of the citizens to pass the bridge free of toll; that is, if the facts stated in the bill, and not denied by the an-

McGinnis vs. The Justices of the Inferior Court of Gordon County.

swer are true ; and it is equally clear that the County from the sale so made by the Inferior Court to McDill, was reimbursed all that was paid or advanced by the Court to Lawson to enable him to build the bridge, and secure this benefit, for the \$6,500, paid by McDill to the Inferior Court covers all the outlay which is set up by the answer. Then if it be true, that the County has received back all that she paid out for this vested right of which so much is said, and it has been fairly sold and paid for by McDill, and secured by a solemn grant from the Inferior Court, which vests in complainant by his purchase, it would be grossly unjust and inequitable to deprive him of the same or to interfere in any way with his full, free and perfect enjoyment thereof.

Defendants admit that they have instructed Road Commissioners to remove the toll gates and keep open the same for the free passage of the citizens of the County ; the infliction of the fine ; the passage of the order, &c., and plead as a justification or excuse, the recommendation of the Grand Jury of the County. The unauthorised action of any body of men, however respectable, can never excuse an independent judicial tribunal for an invasion of the rights of an individual unheard.

It is said by the defendants in their answer, by way of an avoidance of the Equities of the bill, that the Sheriff's sale was illegal ; that no title passed ; that the land was not legally sold ; that the bridge was not sold ; that the bid of the Inferior Court was not legally transferred, &c. Then it is of the greater importance that the bill should be retained to settle and quiet the title to the premises, and if it be true that no title did pass to McDill, the County of Gordon surely, under the circumstances, would refund the purchase money. If the facts in this bill are true, it does not lie in the mouths of these defendants to cast a cloud on the complainant's title.

For these reasons, and as the answer does not fully and completely deny the Equity of the bill ; the judgment of the Court dissolving the injunction and dismissing the bill was erroneous, and must be reversed. The injunction as well as the bill must be retained to a hearing on their merits.

It was argued with great force by counsel for defendants, that the judgment of the Court below ought to be affirmed, because they argue there was no Equity in the bill ; that complainant's remedy at Common Law in trespass was ade-

quate and complete; that this bill could not be maintained against defendants as an Inferior Court. To all this the reply of this Court is, that these questions were involved in the demurrer, and were by the judgment of the Court below thereon fully adjudicated, and they are now between these parties no longer open questions. My own opinion is, that there is Equity in the bill, and that injunction is the proper remedy; but as the judgment of the Court is not put on that ground it is not necessary to give the reason.

Judgment reversed.

CHASTAIN & LUCK vs. ROBINSON et al.

1. What was said and done by the Justice of the Peace, at a Justices' Court, when a levy of property was advertised for sale, under executions, is inadmissible on the trial of a claim for other property levied on by the same *fi. fas.*, for the purpose of accounting for a proper disposition of such previous levy, or for any other purpose.
2. The declarations or statements of one who is no party to the record, and who in no other way appears to be a party in interest, is not competent evidence to affect the rights or interests of the plaintiffs, or parties before the Court.
3. The Court should always, upon request, charge the Jury specially as to any fact relied on by either party, that is true and material, so as the Jury may be advised by the Court of its legal effect and application to the issue they are trying.

Claim, in Chattooga Superior Court. Tried before Judge Crook, at September Term, 1859.

This was a claim interposed by F. W. Cheeny to a lot of land levied on as the property of A. G. Robinson, by virtue of two *fi. fas.* issued from a Justices' Court in Hall county, in favor of Chastain & Luck, for the use of C. & J. Peeples, against said Robinson.

Upon the trial, claimant, amongst other evidence, introduced one Wesley Shropshire, who testified: That he was in Milledgeville on the 14th December, 1855, as Senator from Chattooga county, and that James Cantrell was there as Senator from Lumpkin county; that Cantrell spoke to him about some *fi. fas.* against A. G. Robinson, and that there was a lot of land in Chattooga county which was subject to said *fi. fas.*; witness knew that Dr. Cheeney claimed said land, and he wrote and informed him of the fact, and Cheeney answered witness to see if the *fi. fas.* were all right, and to settle them; witness went to Cantrell and told him that if the *fi. fas.* were all right, Dr. Cheeney had requested him to pay them; Cantrell said that Col. Crook had the *fi. fas.*, and that they were sent off, according to the best of witness' recollection; Cantrell told him the executions were pending for his benefit, and belonged to him; Cantrell, when asked for the *fi. fas.*, did not let witness see them; asked again for them, but did not see them, which induced witness to suspect that all was not right. The entries on the *fi. fa.* of 1850 and 1855 are, in the opinion of witness, in the hand-writing of Cantrell; sat near him in the Senate Chamber, and saw him write often; they are in the same hand, written, in witness' opinion, with the same ink and pen, and at the same time, by James Cantrell.

To this testimony plaintiffs in *fi. fa.* objected. The Court overruled the objection and admitted it to go to the Jury, and counsel for plaintiffs excepted.

To understand the above testimony of Shropshire, it may be proper to state, that there were two entries on the *fi. fas.*—one made 15th February, 1850, and one made 14th December, 1855, signed, or purporting to be signed, by Wm. Taylor L. C., and reciting that there was no property belonging to defendant whereon to levy the said *fi. fas.*

The testimony being closed, counsel for plaintiffs requested the Court to charge the Jury—

1st. That if the entry of December 14th, 1855, was not necessary to keep the *fi. fa.* from becoming dormant, that is a circumstance to show that the entry was not fraudulently made. If all the other entries were properly made, they could disregard the entry of 1855; the other entries being right, the *fi. fa.* would not be dormant.

2d. That if Taylor, the Constable, was in Milledgeville

and requested Cantrell to make the entries of December 14th, 1855, and if they should believe that the same was made in Milledgeville, then it was legal, if made at the request of the Constable and in his presence.

Which charge the Court refused to give, but charged: That the plaintiffs in *fi. fa.* must show title in the defendant in *fi. fa.*, or possession after the rendition of the judgment. If this is shown, then the onus is cast on the claimant to show that the land was not subject. If they believe that the entries on the *fi. fas.* were made by the Justice of the Peace fraudulently, for the purpose of keeping the *fi. fas.* from becoming dormant, and without authority from the Constable, then they should find for the claimants; or if the Jury believe that the entries of 1850 and 1855, were made at the same time and by the same person, without authority from the Constable, and not in his presence, that they might find for the claimant; that the entries made by Cantrell, to be valid, must have been made in the presence, and by authority, of the Constable. But if they should believe, from the evidence, that the entries were made by Cantrell, the Justice of the Peace, in the presence of, and by the request of, the Constable, and at the times they purport to be made, then they were as good as if made by the Constable himself; that fraud could not be presumed, but must be shown either by positive proof or circumstances.

To which charge and refusal to charge, counsel for plaintiffs excepted.

The Jury found for the claimant; whereupon, counsel for plaintiffs in *fi. fa.* moved for a new trial, on the following grounds:

1st. Because the verdict is contrary to Law and evidence.

2d. Because the verdict is contrary to the charge of the Court.

The Court refused the motion for a new trial, and counsel for plaintiffs except, and assign as error—

1st. That the Court erred in rejecting the testimony of William Taylor and Osborn J. Taylor, as to the reason of, and the facts and circumstances relative to, dismissing the levy of the *fi. fas.* on a bay mare, made in 1849.

2d. That the Court erred in admitting in evidence the sayings of James Cantrell, as above stated.

3d. That the Court erred in its charge and refusal to charge, as above stated.

4th. That the Court erred in refusing the motion for a new trial.

JESSE A. GLENN, for plaintiffs in error.

A. R. WRIGHT, represented by T. L. COOPER, *contra*.

By the Court.—LYON, J., delivering the opinion.

1. For what purpose the evidence of the Constable, William Taylor, and that of the Justice of the Peace, Osborn J. Taylor, in relation to the proceedings of the Justices' Court of Lumpkin county, on a question that "sprung up" in that Court, in relation to the legality of the levy on the bay mare, was offered, we are unable to see. The evidence was inadmissible for any purpose that we can imagine. If it was offered to explain a levy on the *fi fas.*, it was inadmissible for any such purpose, as a disposition of a levy made in that way was illegal, and amounted to none at all. But on looking carefully to the *fi fas.* themselves, or the copies thereof attached to the record, we see no levy but such as is sufficiently accounted for or disposed of, to enable the plaintiffs in *fi fas.* to proceed with their collection against any other property of defendant that may be subject to them.

The main defence relied on by claimant to defeat the lien of these executions on the lot of land levied and claimed, so far as we can judge from the record and position of counsel taken in the argument, is, that the entry on the executions of "No property" of the dates of 15th February, 1850, and 14th December, 1855, were not the entries of the Constable, whose name is signed thereto, nor made at the time they bear date, but were made by one James Cantrell, who was claimed to be the owner of them, after the *fi fas.* had become dormant, &c., and that the entries were therefore fraudulent and void, and the executions, in fact, dormant. If these facts are true, the conclusion must be: To prove the facts, claimant offers the testimony of Wesley W. Shropshire, who testifies, that the entries of those dates are in the hand-writing of James Cantrell, and this fact is also proved by the Constable himself, who says that Cantrell did make the entries for him and at his request, and, he thinks, at the dates thereof. Shropshire testifies, further, that he was in Milledge-

ville on the 14th December, 1855, and that Cantrell was there as a Senator in the Legislature from the county of Lumpkin. We do not understand the witness to say that Cantrell was himself in Milledgeville on that day, and made the entry then.

If Cantrell had an interest in these executions—if they were proceeding for his benefit, then it was to his interest to have these entries made and dated back; that is, if they had become dormant for the want of such entries; and the circumstances connected with the interview, as testified to by Mr. Shropshire, might have created a very strong presumption against the *bona fides* of these entries, that would very justly have operated materially on the minds of the Jury in passing on this question. On the contrary, if Cantrell had no interest in the *fi. fas.*, there was no motive to him to fabricate a false and fraudulent entry on the same, in order to give vitality to them, which they did not otherwise have. It was, therefore, important to show that Cantrell had an interest in these executions. For that purpose, claimant proposed to prove, by the witness, Shropshire, a conversation between witness and Cantrell, in relation to the execution that occurred in Milledgeville, in the winter of 1855, and what Cantrell then said to the witness about his ownership of, and interest in, the executions; who had them, and for what purpose, &c. Counsel for plaintiffs in execution objected to this evidence and the Court overruled the objection, and the witness was allowed to testify to the conversation, to what Cantrell said, &c.

2. In this the Court committed error. The executions were proceeding in the name of Chastain and Luck, for the use of C. and W. J. Peeples. They were the parties in interest before the Court to be affected by the judgment of the Court; and there was nothing before the Court except the statements of Cantrell, showing that the executions did not belong exclusively to the plaintiffs therein. They were not present when Cantrell made the statements complained of, nor did they in any other manner assent thereto. Cantrell's admissions, declarations or statements could not affect the rights of these plaintiffs. They could only affect himself, and until it was shown to the Court, by other evidence, that the *fi. fas.* did not belong to the plaintiffs, but to Cantrell, the evidence ought to have been excluded.

3. At the date of 14th December, 1855, and during that entire winter, these executions were not dormant, even if no entry had, in fact, been made since that of 20th June, 1849, which is not questioned. That fact was an important one to be considered by the Jury, with all others, as to the *bona fides* of the two contested entries. For if, at the conversation with Shropshire, the *fi. fas.* were not then dormant in the absence of the two entries of 1850 and 1855, and they could not have been, if the entry of 20th June, 1849, is a genuine one. There was no particular necessity, at that time, to antedate or fabricate a return or entry of no property on the *fi. fas.* Hence, the Court ought to have charged the Jury, on the request of counsel, that they might consider this as circumstance showing the *bona fides* of the entries.

Judgment reversed.

LEONARD vs. PEEPLES.

1. In order to prove Statute or customary law, it is not competent for a witness to testify simply, that such is the one or the other. There is higher evidence to substantiate both.
2. Because property is not as valuable as the purchaser supposed, is no reason in the absence of fraud or warranty, for withholding any portion of the price agreed to be paid.
3. Where one misrepresents a fact, knowing it to be false, or asserts a thing to be so, not knowing whether it be true or not, and it proves to be false, he is, in both of these cases, guilty of a moral as well as a legal fraud. But where one honestly believes the truth of what he affirms, although it turns out he was mistaken, can he be guilty of a legal fraud (being free from moral turpitude) so as to subject him to liability for the mistake, unless the representations are of a character to amount to a warranty? *Quere.*

Debt, in Murray Superior Court. Tried before Judge CROOK, July, 1859.

This was an action of debt by Alexander J. Leonard against John H. Peeples, on a promissory note, of which the following is a copy, viz:

"\$424 87. One day after date we, or either of us, promise to pay John A. J. Leonard, or bearer, the sum of four hundred and twenty-four dollars and eighty-seven cents, for value received of him October 1st, 1853.

(Signed)

JOHN H. PEEPLES.

JOHN W. BAKER.

H. A. JOHNSON."

Defendant pleaded the general issue; and further, that said note was procured by fraud and misrepresentation, in this, that said note was given in part for an interest in a claim in a gold mine in the State of California, sold by plaintiff to defendant and his associates, Baker and Johnson; and that plaintiff represented to defendant and his associates, that if they would purchase said interest they could clear three thousand dollars, and defendant relying on said statement, not knowing any thing of the mine himself, bought said interest for \$1,200, seven hundred and seventy-five dollars and 13 cents of which was paid in cash, and the note

Leonard vs. Peebles.

sued on, given for the balance; and defendant avers that said representation was false, that said mine was worth nothing, and that the consideration of said note totally failed, &c.

The testimony being closed, the Court charged the Jury as follows:

1. Whatever representations were made by plaintiff at the time of the sale, or pending the negotiation, he is bound by, and that they amount in Law to a warranty that the thing sold is as represented.

2. That if plaintiff represented the mine sold to be a good one, (he being a miner, and having an opportunity of knowing,) and Peebles had not seen and examined it, and these representations were the inducement to purchase, then it is immaterial whether the representations were fraudulently made, or by mistake. The plaintiff must suffer the consequences resulting therefrom.

3. That the testimony of one witness who testifies positively to a fact, outweighs the testimony of many witnesses who testify that they have no knowledge of it.

4. If you shall believe, from the evidence, that the mine was of some value, and that it was equal in value to the amount paid, *in cash*, by defendant, and of no more value, then, the plaintiff is not entitled to recover this note—the balance of the purchase money.

Plaintiff's counsel requested the Court to charge, that if defendant inquired of Freeman (the Treasurer of the mine) as to its value, and that if he exhibited his day-books showing their mining operations, and which was true, then the parties negotiated upon equal terms.

This charge the Court refused to give, holding that this testimony was introduced for the purpose of showing that defendant did not act upon the representations alone, and for no other purpose.

Plaintiff's counsel further requested the Court to charge that the sale of a gold mine is peculiar, and that representations concerning them are mere matters of opinion, and did not amount to a warranty, that they were as represented.

This charge the Court declined to give, but charged, that if plaintiff was a miner, and acquainted with the business of mining, and had worked the mine sold, then he is bound by any false representations made by him to defendant, as to its value, and clearly so, when they are made to one who has

neither seen nor examined the mine and buys upon such representations.

The Court further charged, that the doctrine of *caveat emptor* does not apply, and that it was not necessary to defendant's support of his plea, or defence, that he should tender back the property purchased.

The Jury found for the defendant, whereupon plaintiff moved for a new trial, on the grounds—

1. That the Court erred in allowing defendant to prove by witnesses, that it was the custom and law in the mining districts of California, when a mine claim was purchased, and proved or turned out to be unprofitable or worthless, for the vendor to give up the note given for the purchase money.

2. Because the Court erred in its charge to the Jury, and its refusal to charge as above stated.

3. Because the verdict was contrary to Law and the evidence.

The Court refused the motion for a new trial, and plaintiff excepted.

J. A. W. JOHNSON, for plaintiff in error.

WALKER, represented by DABNEY, *Contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Leonard sold to Peebles and two others, an occupant claim, which he held in the gold diggings of California, for \$1,000. The purchaser paid, say \$575 cash, and gave the note sued on for the balance. This action is brought to collect this note, and the defence set up is two-fold—fraud in the contract and failure of consideration.

There was much testimony read on the trial, and, amongst the rest, the Court allowed the defendant to prove that according to the law and custom of that country, that whenever a note was given for a gold mine and it proved unproductive, or did not turn out according to expectation, it was given up, and this is the first error complained of.

California was a State when this transaction took place in the fall of 1853, and no evidence is adduced of any such Law at that time, and no such custom was established as to authorize the Court below to recognize and act upon it. No proof

Leonard vs. Peebles.

was offered that Leonard had notice of any such custom, or of the existence of any such custom which was public and uniform and peaceable, so as to infer that this contract was made in reference to it. If there be such a custom, it is so unreasonable, that it was probably enforced by the Bowie knife.

All the other exceptions grow out of the charges and refusals to charge on the part of the Court. As we shall send this case back, we forbear to express any opinion as to the preponderance of the proof.

And before examining each specification in the motion for a new trial, I would remark, generally, that the Court seems to have labored under this misapprehension, that any thing said at the time of the trade, whether it amounted to a positive representation or a mere expression of opinion, was a warranty for the breach, of which the plaintiff was responsible. Indeed, this is the very language of the first charge which is assigned as error.

"Because the Court charged the Jury that whatever representations were made by the plaintiff, pending the negotiation and at the time of the sale, to the defendant, were binding on the plaintiff, and amounted in Law to a warranty that the mine sold, was of the character it was represented."

All the evidence on the part of plaintiff, was to the effect that if the mine proved as productive as it had been, the upper end of it would reimburse the purchasers, and the lower end would be nett profit. Surely the opinion thus expressed, does not amount that these results would follow.

Another error complained of is this: the Court charged the Jury that if they should believe from the testimony, that the mine sold was of some value, and that it was equal in value to the amount that the plaintiff had received at the time of the purchase, and no more, that then the plaintiff was not entitled to recover the balance.

This is putting the issue upon value, alone, irrespective of fraud or warranty. This cannot be the Law of the case, or the rule of the plaintiff's rights.

We do not think the Court was bound to charge, as Law, the first request made by counsel for plaintiff, namely, that, "if the defendant inquired of the witness Freeman," (the Treasurer of the Company) "as to the value of the mine, and the said witness showed him a book of their mining,

which was true and correctly kept; that defendant was upon equal terms with the plaintiff."

It will be borne in mind, that the parties were fifty miles distant from the mine when the sale was made. The plaintiff had been working it for sometime. The defendant had never seen it. Of course, then, a bare inspection of the book kept by the Company, would not itself put the defendant upon an equality with the plaintiff.

We cannot sustain the instruction which the Court gave the Jury, that "the testimony of Freeman, the witness, was admitted for the purpose of showing that the defendant in making the purchase, did not act solely upon the plaintiff's representations, and that only for that purchase could they consider it."

Mr. Freeman was present at the trade, and his evidence is full, as to all that transpired at the time; and his testimony, if credible, establishes that all the plaintiff said was by way of opinion only; and he substantiates the truthfulness of Leonard's representations. His evidence, therefore, was material on many accounts.

We do not think the plaintiff was entitled to the second charge which he asked, that "the sale of gold mines was peculiar, and that representations concerning them are matters of opinion only, and do not amount to a warranty, that they are as represented.

This, we apprehend, depends entirely upon the nature of the representations. They may be so positive as to amount to a warranty, and if so, they stand upon the same footing as representations concerning any other species of property.

The second and last charge are very similar. The second is to this effect: That "if the plaintiff represented the mine sold to be a good one, (he being a miner and having an opportunity of knowing,) and Peeples had not seen and examined it, and these representations were the inducement to purchase, then it is wholly immaterial whether the representations were fraudulently made, or by mistake. The plaintiff must suffer the consequences resulting therefrom."

And the last charge was, that "if the plaintiff was a miner, and had a practical knowledge of the business, and had operated in the mine sold, he was bound by any false representation made by him to Peeples as to the value of the mine, especially as Peeples had not seen nor examined the

mine, and bought only upon the faith of such representations."

Much has been written upon the principle of Law involved in these charges. This ought to be the doctrine of the Courts upon this subject: When one misrepresents a fact, knowing it to be false, or asserts a thing to be so, not knowing whether it be true or not, and it turns out to be false, he is, in both of these cases, guilty of a moral, as well as a legal fraud. But where one honestly believes the truth of what he affirms, he is clearly not guilty of moral turpitude, and I should be slow to convict him of a legal fraud, so as to subject him to liability for the mistake, unless the representations were of a character to amount to a warranty. (See *Thorn vs. Bigland*, 8 *Exch. Rep.*, 781; *Wilde vs. Gibson*, 1 *H. L. Cases*, 605, 603; *Taylor vs. Ashton*, 11 *M. & W.*, 407, 415.)

If the defendant's witnesses in this case have sworn the truth, the mine did not pay expenses. And yet, after Johnson and Baker had been six weeks at work in the mine, they bought out Mr. Peeples' interest at the price he paid Leonard, and continued to work the mine until they had dug out every foot of it. It will be for another Jury, who will be more competent to the task than we are, to reconcile this and other portions of the testimony.

GANN vs. THE STATE OF GEORGIA.

1. Whenever the homicide is the result of that sudden and violent heat of passion, which is supposed to be irresistible, and without any malice or deliberation, the killing is Voluntary Manslaughter, and not Murder.
2. If, upon a sudden quarrel, the parties fight upon the spot, or presently agree and fetch their weapons and fight, and one of them is killed, such killing is but Voluntary Manslaughter, no matter who strikes the first blow.

Murder, in Cobb Superior Court. Tried before Judge Ricks, at September Term, 1859.

This was an indictment against Jephtha Gann, charging him with the murder of William Collins.

It was shown by the proof, that: On the 23d day of April, 1859, in the county of Cobb, the deceased, the prisoner, John Oshields, Joseph White, Alexander Cupp, Nancy Scoggins, and Fanny Scoggins, were all on their way home from Marietta; that, as they went along, deceased and Nancy Scoggins fell out; that deceased commenced blackguarding Nancy Scoggins with vulgar language, which was the first beginning of any difficulty; that the blackguarding of Nancy Scoggins, by the deceased, made the prisoner mad; prisoner was in company with Nancy Scoggins; that prisoner cursed deceased, and wanted to fight him; that when the prisoner said he would whip deceased, if he did not mind, deceased replied that that was as good a time, he reckoned, as he would ever get; that the altercation then ceased, and the parties made friends, and drank together at Gault's grocery, the prisoner buying the liquor; that the prisoner and his immediate company, consisting of Nancy Scoggins, Fanny Scoggins, and Alexander Cupp, left the grocery first, and started on home; that after they had gone on some little distance, the deceased, Oshields, and White, also left the grocery, and went on towards home, along the same road; that after going along, and getting near to Mr. Hunton's, the deceased and Oshields began to sing a song about the Fillmore boys; that the words of the song seem to be harmless, but the manner of singing the song, or something else, offended Nancy Scoggins, who had a child named Fillmore; that the deceased and Oshields were told by prisoner, that if they

Gann vs. The State of Georgia.

wanted to sing, either to stay behind or go on before; that deceased, Oshields, and White, then passed by prisoner and the Scogginses, and again commenced singing the song; that prisoner again cursed them, saying that any man who would sing such a song as that, before decent women, was of no account, and that he was the best man that ever made a track on Marietta hill, and could whip any Collins or Oshields of the name; that deceased replied, "No you can't, you can't whip Scott Oshields," to which prisoner rejoined, "Yes I can; I can whip him the best day he ever saw"; that Oshields and deceased were told not to sing any more or say any thing else to prisoner, as he was drunk and did not know what he was doing; that in going about seventy-five yards, White and Oshields got before the deceased about thirty steps; that when about that distance ahead, they rather stopped and heard three licks back behind them; that they turned and went back and found deceased retreating from prisoner whilst prisoner was advancing on deceased; prisoner had something in his hand that looked bright; that it was dark, and the prisoner was drunk, and the deceased was sober; that when White and Oshields got back to the place of rencounter, deceased said that prisoner had cut him badly, to which prisoner replied, "Yes, and I am sorry for it"; that White caught hold of deceased by one arm and Oshields took him by the other, asking him if he was sick, and when asked the second time, replied that he was, and began to sink down; White and Oshields then let him down in the lock of the fence, and he died in a short time; White and Oshields heard the blood spouting, or bubbling, from his wound; that when deceased was caught by White and Oshields, he had an open knife in his right hand, which one of the witnesses took from his hand and put it into the witness' pocket; that prisoner had a double-barrel shot gun, which Nancy Scoggins was carrying at the time; prisoner also had a pistol, but the evidence did not show that he was carrying the gun or pistol with any reference to deceased, or that he drew or attempted to use either of them against deceased, except that one of the witnesses testified that after deceased had been let down in the lock of the fence, prisoner said to deceased, not to crowd him, or rush on him, for he had his repeater drawn; deceased was stabbed on the shoulder, under the collar bone, with a knife, and the wound caused his death; that prisoner had the

knife shown in Court on the night of the difficulty—it is called a Spanish dirk, but is not above the size of a pocket knife, and shuts up, and is carried in the pocket. On the night of the homicide the prisoner was arrested at a house in or near the Camp Ground, and when arrested, was in bed with Nancy Scoggins, who is an unmarried woman, and Alexander Cupp, all three being asleep in the same bed; that blood was seen on the under-dress of Nancy Scoggins, who said it got on her dress as she stooped down to see if deceased was dead; that prisoner was, when arrested, searched for weapons and none were found on him; the coat-sleeve and the arm of prisoner was cut with a knife, and there was also a cut on the left breast of his coat; that from the place where White and Oshields heard the three licks down to the place where they took hold of deceased when they went back, there was blood along on the ground; that there was but one wound of any importance on deceased; that during the altercation between prisoner and deceased, about whipping Scott Oshields, prisoner said, "O, God damn you, Dorse, here I come"; there was a pistol, and the knife aforesaid, found next day at the place of rencounter, both of which were shown to belong to prisoner; the knife which was taken from deceased, was shown in Court, and identified as his.

The Jury found the defendant guilty.

Defendant, by his counsel, moved the Court for a new trial in said case, on the grounds:

1. Because the finding of the Jury was contrary to the evidence in said case.
2. Because the finding of the Jury was contrary to Law.
3. Because the Jury found a verdict in said case which was decidedly and strongly against the weight of the evidence in said case.

4. Because after the Court, in compliance with the request of defendant's counsel, had charged the Jury that, "whilst voluntary drunkenness is no excuse for crime, yet the drunkenness of the defendant, at the time of the killing, may be considered on the question whether the defendant was excited by passion, or actuated by malice in committing the homicide." Qualified said charge by adding thereto the following, to-wit: "In case it is proven that any such provocation was given as the Court has already mentioned, that is a provocation not by words, threats, menaces, or contemptuous gestures alone,

Gann vs. The State of Georgia.

whether said or sung, but an actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing." In connection with this, the presiding Judge further certifies, that he charged the Jury that, "in all cases of voluntary manslaughter, there must be some actual assault upon the person killing by the person killed, or an attempt by the person killed to commit a serious personal injury on the person killing."

5. Because after the Court, at the request of the defendant's counsel, had charged the Jury as follows: "If you believe from the evidence, that, at the time Gann killed the deceased, the deceased had a knife drawn, and was cutting at Gann, or attempting to cut or stab him, and that Gann killed deceased to save his own life, or killed deceased under the influence of a reasonable fear that deceased would kill him, or inflict upon him serious bodily harm, or was trying to kill him at the time, then the defendant Gann is not guilty of murder, and you ought not to find him guilty of murder." Qualified said charge, by adding thereto the following, to-wit: "But if the prisoner first advanced on, and assaulted the deceased with a knife, or other deadly weapon, then the deceased might defend himself, and if, in defending himself, he cut the clothes, or even the person of the prisoner, that would not justify the prisoner for killing deceased, unless the prisoner had, after he assaulted deceased, really, and in good faith, endeavored to decline any further struggle before he struck the mortal blow, and that, at the time he struck the mortal blow, the danger to himself was so urgent and pressing, that in order to save his own life, he killed deceased," as such addition and qualification were illegal and unwarranted, and unsupported by the evidence.

6. Because the Court erred in admitting in evidence, over the objections of prisoner's counsel, where and with whom Nancy Scoggins slept, and where and with whom the prisoner slept, on the night of the alledged murder, and after it had occurred, as such evidence was illegal, irrelevant, and calculated to prejudice the Jury against the defendant for vices, immoralities, and indecent conduct, having no connection with his guilt or innocence of the alledged murder.

The motion was overruled, and the new trial refused, and defendant excepted, and assigns the same as error.

IRWIN and LESTER, for plaintiff in error.

WM. PHILLIPS, Solicitor General, *Contra*.

By the Court.—LYON, J., delivering the opinion.

The Court having charged the Jury that, "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing by the person killed, or an attempt, by the person killed, to commit a serious personal injury on the person killing," and then, after giving a charge as requested by counsel for prisoner, qualified such charge thus: "In case it is proven that any such provocation was given as the Court has already mentioned, that is, a provocation not by words, threats, menaces, or contemptuous gestures, whether said or sung, but an actual assault upon the person killing, or an attempt by the person killed, to commit a serious personal injury on the person killing." This charge, when considered with reference to the facts of this case, is erroneous.

The Court was evidently impressed with the idea, that the only thing which, under our Statute, could reduce a homicide from murder to voluntary manslaughter, was an actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, and such is the letter of the Statute on this subject, but there is more in the Statute besides that. The Statute says in another place, that "the killing must be the result of that sudden, violent impulse of passion, supposed to be irresistible, and that is the general principle distinguishing voluntary manslaughter from murder rather than that enunciated by the Court. Whenever the killing results from such passion alone, and not from any mixture of malice or deliberation, then the killing is not murder, but is voluntary manslaughter, no matter how that passion may be aroused, for if there is no malice either expressed or implied, or criminal neglect, there can be no murder. The clause of the Statute given by the Court to the Jury to control them in passing on the facts of this case applies to that class of cases, and was so intended by the Legislature, where the only excuse for the killing was the provocation given by deceased to accused. Not to those cases, however, when the provocation given is of such a character that it so excites the slayer with such great and sudden

heat of passion, that he cannot resist its influence, and when the killing is caused by such passion, and not solely on account of the provocation given. Any other construction of this Statute would leave a large number of cases of homicide unprovided for, which are neither murder, involuntary manslaughter, or justifiable.

2. From all that we can see of the facts of this killing as disclosed by the evidence, these parties, that is, the deceased and the accused, went into the fight mutually, upon equal terms, each having and using a knife upon a sudden heat of passion caused by the provocation given by deceased, and their almost immediate collision, and that the killing was the result of this mutual fight and sudden heat of passion rather than of the provocation. Now, if this was the fact, the killing was voluntary manslaughter and not murder, and so the Court ought to have charged the Jury. Instead of this, the charge as given, taken altogether, excludes such a principle from the consideration of the Jury.

We find the principle thus broadly laid down: "If A and B fall suddenly out, and they presently agree to fight in the field, and run and fetch their weapons, and go into the field and fight, and A kills B, this is not Murder, but homicide," (manslaughter). 1 *Hale*, P. C. 458. "If, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons and go into the field and fight, and one of them falleth, it will be but manslaughter." 1 *Hawkins*, 31, § 22, 29. 4 *Blk Com.* 191. Upon words of reproach, or any sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side, and death ensues under such circumstances, the offence of the party killing will amount only to manslaughter." 1 *Russ. on Crim.*, 585, refers to *Fost.* 285.

"If two draw their swords upon a sudden quarrel, and one kills the other, it is only manslaughter." 1 *Russ. on Cr.* 586, refers to *Rex vs. Walters*, 12 *St. W.* 113, and in such case it is immaterial who strikes the first blow.

Could a principle be clearer or better settled? And it in no wise conflicts with our Statute, but is in full accordance with its very letter and spirit. Manslaughter, says the Statute, "is the unlawful killing, &c., without malice, without deliberation, which may be voluntary UPON SUDDEN HEAT OF PASSION, or involuntary," &c., and again, "the killing must be the result of that sudden, violent impulse of passion," &c.

Apply this principle to the facts of this case. Deceased and his friends were traveling faster than accused and his crowd; for he was behind—had overtaken and passed them some twenty or thirty steps, when he renewed the singing that was so offensive to the prisoner. Prisoner cursed deceased, and said "he could whip any O'Shields or Collins of the name." Deceased denied this; he was willing for the fight and had been from the first of the difficulty, and, instead of going on with his companions, as he had been previously, he stops in the road and waits for accused to come up with him, and then the fight commences, each having and using his knife—blows and wounds are given and received, and no one knows who is the aggressor. The result is, that the prisoner in the fight kills Collins, the deceased, by a stab with his knife. Now, it is manifest, that he did not kill Collins solely on account of the provocation, because at that time, the distance between them was some twenty or thirty steps, and prisoner had a Repeater and double-barrel gun, and used neither to revenge the affront, which it is likely he would have done, had it been his purpose to kill deceased for the provocation. Had he done so in that way, his crime would have been Murder. The provocation would have been no excuse. But he does no such thing; on the contrary when he, in his anger, comes up, and in collision with deceased, who was awaiting him for that purpose, in the dark, they engage with each other in a mutual fight, on equal terms.—Now, it is clear that such killing, if we have the facts aright, under the rule stated, is not Murder, but Manslaughter, and so the Court ought to have charged the Jury, and so should have been their finding; and as the Court did not so charge, nor the Jury so find, we reverse the Judgment of the Court below, and send the case back for a new trial.

There is nothing else in the rulings of the Court that is necessary for us to pass upon.

Judgment reversed.

Murdock vs. Mitchell.

MURDOCK vs. MITCHELL.

1. A Court of Equity will enjoin an Administrator from recovering a tract of land when the intestate has been dead more than seven years, and the heir at Law was of age at the death of intestate, and when there are no debts against the estate, and the defendant has been in adverse possession for seven years before commencement of suit or grant of administration.

Equity, in Cobb Superior Court. Tried before Judge CABANISS, at September Term, 1859.

This was a Bill filed by Jane L. Mitchell, in Cobb Superior Court, alleging that she was regularly appointed administrator of Samuel Mitchell, deceased, who was her late husband; that about the 13th of September, 1837, William G. Robinson purchased from Thomas Patterson, lot of land number one hundred and twenty-one, in the 20th district of the 2nd section of Cobb county, and went into the possession and occupancy of the same, claiming it adversely; that Robinson afterwards conveyed the land to Michael O'Brien; that the land was afterwards sold at Sheriff's sale as the property of O'Brien, and Samuel Mitchell, complainant's intestate, became the purchaser; that Philip Clayton and Elizabeth Clayton went upon the land, and occupied as tenants of Mitchell; that the land was held by complainant, and those under whom she claimed, by regular bargain and sale, and deeds of conveyance from the year 1837 until in August, 1849, continuously and adversely; that Thomas J. Murdock, as the administrator of one Elizabeth Brown, deceased, commenced an action of ejectment against Elizabeth and Phillip Clayton, for the recovery of said land and mesne profits; that Murdock's letters of administration were obtained in July, 1849; that his intestate, Elizabeth Brown, died in the fall of 1835, leaving no debts to pay, and leaving but one child, and heir at Law; that said administration of said Elizabeth Brown's estate, was unnecessary, either to pay debts against her estate, or to make distribution thereof; that there was nothing, and had been nothing to hinder or prevent the heir at Law, of Elizabeth Brown, from asserting her right to said land, and that as she had failed so to do, the complainant had a perfect title to the land by the Statute of Limitations and adverse possession. The Bill prayed for discovery and a perpetual injunction of the action of ejectment.

The answer of the defendant admits substantially the facts and allegations set forth in the Bill.

It was admitted, and agreed by counsel on both sides in the Court below, that the following facts were true, to-wit:

Elizabeth Brown, the drawer and grantee of the land in controversy, and intestate of the defendant, died in the fall of 1835, leaving one daughter Mary, who was the wife of Lewis Lodge; that Lewis Lodge died in the life time of Elizabeth Brown, leaving his wife Mary and two children, one of whom died long since, and the other is still living; that Mary again married a man by the name of Cross, by whom she had five children; that Mary's marriage with Cross occurred in Elizabeth Brown's life-time; that Mary died after the death of Elizabeth Brown, leaving her husband Cross, and five children, all of whom, except one, were minors at the commencement of the action of ejectment for the land in dispute; that neither of the husbands, or the heirs of Mary, ever reduced the land to possession, or took administration on her estate, or upon that of Elizabeth Brown; that Murdock obtained administration on Elizabeth Brown's estate on the 2nd of July, 1849, and commenced the action of ejectment the 23d of July, 1849; that the deed in complainants chain of title is not the deed of the grantee, but is either a forgery or made by some other Elizabeth Brown. It was also agreed that as the result of the trial depended entirely upon a legal question, that that question should be argued before the Court, and as the Court might decide, so the verdict of the Jury should be rendered.

The Court, upon hearing argument, decided that, "upon the death of Elizabeth Brown without any debts to be paid, and leaving but one heir at Law, namely: Mary Cross, her daughter, the title to her land passed to her heir at Law, and vested in her, and she could maintain an action of ejectment for the recovery of the land in dispute. The real estate of Elizabeth Brown could vest in her administrator only for two purposes, to pay her debts, and to make distribution among her heirs at Law; but there being no debts to be paid, and but one heir at Law, there was no necessity for the administrator to recover and sell the land for either purpose, and, consequently, the administrator of Elizabeth Brown could not legally dispose of the land so as to divest the title of the heir at Law; but upon the death of Elizabeth Brown, with no

Murdock vs. Mitchell.

debts to be paid, and leaving but one heir at Law, the title to her land, vested in her heir at Law, Mary Cross, and the husband of Mary Cross, by virtue of his marital rights, was entitled to all the choses in action of his wife upon reducing them into possession; and as his wife, Mary Cross, died before he reduced the land in controversy into possession, he was entitled to administration on her estate without being liable to distribution, and as such administrator was entitled to recover the land, unless superior outstanding title should be shown, and when so recovered, it would be his property, and not subject to distribution. It not appearing that the recovery of the land, by the administrator of Elizabeth Brown, was intended to enure to the benefit of the husband of Mary Cross, and his administration of the land being unnecessary to pay the debts of Elizabeth Brown, or to make distribution among her heirs at Law, his suit for the land was such a one as, according to the decisions of the Supreme Court, ought to be perpetually enjoined.

The Jury rendered a verdict and decree, in accordance with the decision of the presiding Judge, which decision was accepted to by defendant, and alledged here to be erroneous.

IRWIN and LESTER, for plaintiff in error.

A. J. HANSELL, *Contra*.

By the Court.—LYON, J., delivering the opinion.

Upon the death of Elizabeth Brown, the drawer and grantee of the lot in controversy, the title was cast upon Mary Cross, the only child of the intestate, and her husband, James Cross, as the only heir at Law of said intestate, subject only to the payment of debts of intestate; and as there were no debts, the whole title vested absolutely in them without the necessity of administration. Adverse possession to this title commenced in 1827, during the life of Mary. She, and her husband, could have maintained ejectment for its recovery against the tenant. *Carruthers vs. Baily*, 8 *Kelly* 108; see also *Wellborn vs. Weaver*, 17 *Geo.* 270. Upon the death of Mary, the daughter and wife, subsequently in 1840, whatever title, equity, or interest, she might have had in the land during the coverture, by reason of her husband not having

reduced the same into his *actual* possession—see *Chappell vs. Causay*, 11 Geo. 28—vested absolutely in her husband, James Cross. *Bryan vs. Rooks*, 25 Geo. 624. Here, then, was the legal title to this land from 1840 to 1849, in James Cross, with an adverse possession under a claim of right, supported by a paper title, running all the time not only against his title, but all the world. What prevented him from bringing his action of ejectment for the recovery of the possession during all this time? If it be replied, that he could only sue as administrator on the estate of his wife, we answer, *that* is not so certain. What is the necessity of an administration under the circumstances? No distribution is to be made, no account to be taken or rendered; then, why administer? He is the heir at Law. Again, nearly twenty years have elapsed since the death of his wife—what evidence have we, that no administration has been had on her estate? But allow that an administration was necessary, and that none has been had, we ask why Cross, the heir at Law, did not administer and assert his right before the Statutory bar attached? What obstacle was there to an administration? None whatever; and his failure to administer, even if that was necessary, in time, is as fatal to his right to recover as the failure to bring his action within the Statutory period. Shall he be permitted to slumber over his rights, until the claims of third persons have ripened into a paramount title?—until the rights of innocent and *bona fide* purchasers have attached, and then do, indirectly, through this otherwise unnecessary administration, what he could not do himself directly? We apprehend not. This question has been frequently before this Court, and as often decided by it, that a Court of Equity under the circumstances, would, by injunction, protect the occupant from such action. In *Jonekin vs. Holland*, 7 Geo. 591, one Studstill, who was the owner of the lot in dispute at his death, died intestate in 1820, leaving all of his children and heirs at Law, of age. Subsequently, Jonekin held the lot adversely more than seven years. Holland took out letters of administration on the estate of Studstill in 1846, and brought ejectment against Jonekin for the recovery of the lot. Jonekin filed his bill setting up these facts, and prayed a perpetual injunction. Judge Lumpkin, who pronounced the opinion, says: “I am happy to find that my brethren are quite clear, that equity will interpose to protect the occupant under the

Murdock vs. Mitchell.

facts set forth in this bill. It would be a palpable fraud on the Law, to permit the heirs to do that indirectly, under color of an administration, which they have lost the right to do directly." In *Woolfolk vs. Beatty*, 18 Geo. 528, which was a bill filed for the same purpose, the Court say, "In 1852, forty two years after the adverse possession began, James Beatty administers upon the estate of Andrew McNeely, with no debts to pay, and commences his suit at Law to recover the property for the purpose of distribution. And this injunction is prayed for to restrain the action. We are fully satisfied, under the facts and circumstances of this case, that the injunction should have been granted." In support of that decision, this Court refers to *Wagner vs. Baird*, 1 Howard 234, in which the Supreme Court of the United States lays down the principle thus broadly: "Long acquiescence and laches, by parties out of possession, are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment. The party guilty of such laches, cannot screen his title from the just imputation of staleness, merely by the allegation of an imaginary impediment or technical disability." "What," says this Court in applying the principle to the facts in *Woolfolk vs. Beatty*, "is the pretence, upon which the great hardship and gross injustice in recovering this property from these bona fide purchasers, sought to be justified? That no administration has been taken out upon the estate of old Andrew McNeely. Why, did not the heirs force one forty years previously? Is not this, in the language of the authority, an imaginary impediment, a mere technical disability? There was no greater obstacle then than now. If a disability existed, it was voluntary and self-imposed." So we say, again, in this case. The decree of perpetual injunction must be affirmed.

FIELDS vs. RALSTON AND MARTIN.

Where lands are levied on by execution, and claims interposed and withdrawn by successive claimants to whom the property is conveyed, a Court of Equity will interfere and restrain the claimant from withdrawing his claim, and the holder of the title from transferring the same, until the question as to its liability to the lien can be adjudicated.

Equity, in Lumpkin Superior Court. Decision on demurrer by Judge RICE, at July Term, 1859.

This was a Bill in Equity, filed by John D. Fields, against Lewis Ralston and William Martin. The bill alledges that complainant is the owner and transferee of several *fi fas* obtained in a Justices Court of Lumpkin county, against one Samuel King. These executions were issued in the years 1835 and 1836.

That in 1839, complainant ordered the levies then made under said executions, to be dismissed, believing that they could not be sustained, and had said *fi fas* re-levied upon lots of land Nos. 1,080 and 1,055, in the 12th district and 1st section of Lumpkin county. That at the time said last levy was made, the defendant in *fi fas* had the title to said lots of land. That the executions with the levies on said lots, were turned over by the Constable to the Sheriff, and, by him, advertised for sale, and one Tully Choice interposed a claim to said lands, which was returned to the Superior Court of said county, first March Term, 1840, and was continued until 1843, when it was withdrawn, and no record thereof can be found. After Choice's claim was withdrawn, said lots of land were again advertised for sale, when Choice again interposed his claim to lot 1,055, and one Charles V. Chamberlain interposed a claim to No. 1,080, which claims were returned to March Term, 1844, of Lumpkin Superior Court, and were continued from time to time, and transferred to the Appeal, until March Term, 1850, when they were withdrawn, and complainant ordered said lands to be re-advertised for sale, when Lewis Ralston interposed his claim to both lots, and which are now pending. That complainant has been prosecuting his rights up to the time of filing this bill; that the pretended claims to these lands have been, and are now

constantly being transferred, and have finally been transferred to William Martin, and thus the litigation continued and protracted to the great injury of complainant, and by the fraudulent combination of Ralston and Martin to prevent him from collecting his just debts. The bill prayed that said Martin be enjoined, &c.

To this bill, defendant demurs for want of equity. The Court sustained the demurrer and dismissed complainant's bill, and counsel for complainant excepts and assigns said decision as error.

IRWIN and LESTER, for plaintiff in error.

WM. MARTIN, represented by EZZARD, *Contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It would seem, that this was a case where a Court of Equity ought to interpose. Otherwise, we see no end to the litigation involved. By enjoining Lewis Ralston from withdrawing his claim, and William Martin from selling or conveying the two lots of land levied on, he being the last purchaser, until the rights of the parties can be heard and adjudicated under this Bill, there will be a final adjustment of the matter in dispute; and we shall direct that leave be granted to the complainant to amend his Bill so as to effectuate this object.

SPRAYBERRY vs. MERK.

As to a suit for divorce, the wife is *sui juris*, and may charge the husband without his consent with the real value of all such services of other persons as may be necessary to her in the conduct of the suit.

Assumpsit, in Lumpkin Superior Court. Tried before Judge RICE, at January Term, 1860.

This was an action of Assumpsit brought by Henry J. Sprayberry, Esq., against George W. Merk, for services rendered as an Attorney and Solicitor for Ann W. Merk, the wife of the defendant, in instituting and conducting a libel for divorce on behalf of said Ann W. Merk against her husband, the defendant, and in filing a bill in equity for *ne creat*, relating to the divorce cause. The wife at the time she employed plaintiff, was living separate and apart from her husband, and the cases were dismissed before Judgment, on account of the settlement of the difficulty between the parties, and the return of Mrs. Merk to her husband. Plaintiff proved that his services were worth one hundred dollars, and that the causes were dismissed without want of skill, or failure, or neglect, on his part to prosecute them.

At the close of the testimony, the Court, on motion, ordered a non-suit, holding that, under the circumstances of the case, the action could not be maintained against the husband, to which decision plaintiff excepted.

MARTIN, by EZZARD, for plaintiff in error.

No Counsel appeared for defendant in error.

By the Court.—STEPHENS, J., delivering the opinion.

The non-suit was granted in this case upon the ground, that a man cannot be chargeable for the services of a lawyer in bringing a suit against himself without his consent. This is, undoubtedly, true as a general principle, but we think that a suit by the wife for a divorce, must be excepted from its operation from the necessity of the case. As to this one matter of a suit for a divorce, the wife is *sui juris*, having a clear

Sprayberry vs. Merk.

right to institute and conduct that kind of a suit independently of her husband's consent. But this right is practically denied to her if she can command no means of paying the agents who are necessary to the conduct of the suit. Therefore, it is that, *quoad hoc*, she may charge the common funds of herself and husband in his hands. But as this power on her part, is founded on the necessity of the case, so its extent does not exceed the demands of the necessity; and, therefore, she can charge the common funds (or her husband, which is the same thing in effect) only with the real value of such services as she may procure, and not with the price which she may fix on them by her contract. Upon these views is founded the constant practice of the Courts in granting *alimony* to the wife during the pending of her suit for a divorce, and in embracing her counsel fees in the allowance. It is worthy of remark, that her counsel fees are allowed as a part of her necessary *maintenance*, and are allowed before it is ascertained whether she has valid ground for a divorce or not. They are allowed as the necessary means of testing that question, a question which every wife has a right to test whenever she pleases. *Pro hac vice*, she is, *sub modo*, a *feme sole*.

As to the settlement which took place in this case between the husband and wife, after she had got the services of her counsel, it is scarcely necessary to remark, that the counsel, after having acquired a right to compensation for his services by rendering them at the request of the wife, could not be *settled* out of that right by arrangement to which he was no party.

Judgment reversed.

PAYNE vs. MCKINNEY AND WHITLOW.

1. A Deed made since 1839, and attested by a Justice of the Peace, is not admissible in evidence, upon the fact of its having been recorded without other proof.

2. The possession of the vendee under a bond for titles, is not the possession of the vendor, (especially when the former repudiates the title of the latter,) so as to perfect the Statutory title of the vendor, by reason of the adverse holding of the vendor and vendee.

Ejectment, in Fannin Superior Court. Tried before Judge Rice, at the May Term, 1859.

This action was brought by John Doe, *ex dem.* Mordecai McKinney and Miles W. Whitlow vs. Richard Roe, casual ejector, and Nathaniel S. Payne, tenant in possession. Porter Fleming was subsequently made co-defendant.

On the trial, plaintiff read in evidence the grant from the State of Georgia to Mordecai McKinney for the lot of land in controversy; proved the possession of Payne at the time suit was commenced, and that the land lay in the county of Fannin. He also proved, that Whitlow, as the Agent of McKinney, sold the land to John Patterson, taking his note for the purchase money, and executing a bond for titles to John Patterson and Enoch Patterson, jointly; that John Patterson took possession of the land in 1840, asserting title and claiming it as his own; that after he had kept possession of the land for several years, an action was brought in the Superior Court of Gilmer county, in which the land then lay, in favor of John Doe *ex dem.* Mordecai McKinney vs. Richard Roe, casual ejector, and Enoch Patterson, tenant in possession in which action a Judgment was rendered in favor of the plaintiff on the 19th of September, 1848; that after the termination of said suit, Enoch Patterson held the land as tenant of Whitlow for about two years, and then left it, giving Whitlow written notice, that he was his tenant no longer, and would not hold under him; that Enoch Patterson re-entered upon the land, setting up title in himself, and then sold it to Payne, who went into the possession of the land, and remained on it until this suit was commenced in July, 1854; that Enoch Patterson paid John Patterson in full for the land,

Payne vs. McKingey and Whitlow.

but John Patterson never paid Whitlow. Plaintiffs also offered, in evidence, a Power of Attorney, made by McKinney to Whitlow for a valuable consideration, and irrevocable, dated the 6th of April, 1839, empowering Whitlow to sell and convey the land in dispute. The Power of Attorney was attested by a Justice of the Peace, and recorded the 12th of August, 1847. Defendants objected to the introduction of this Power of Attorney, on the ground that its execution was not proven, and that the attestation thereof by a Justice of the Peace, and its registration did not make it admissible in evidence without proof of its execution. The objection was overruled by the Court and the Power of Attorney admitted.

The defendants then introduced the following testimony, to-wit: The grant to McKinney aforesaid; a deed from John T. Bailey, Sheriff of Gilmer county, to John Lamar, dated the 8th of August, 1836, recorded 5th of November, 1836, and made pursuant to a sale of the land in dispute, as the property of McKinney, under a *feri facias* issued from a Justices Court of Wilkes county, in favor of a man by the name of Dooley, for the use of Peter Lamar against said McKinney, and after showing the loss of the *fi fa*, proved its contents, and that it had all the entries on it necessary to authorize a valid sale. Also, a deed from John Lamar to Porter Fleming for the land in dispute, dated 9th of January, 1855; also, a deed from B. B. Moore and LaFayette Lamar, to Porter Fleming, for the land in dispute.

The Jury returned a verdict for the plaintiffs. Defendants moved for a new trial on the following grounds, to-wit:

1. Because the verdict was contrary to the evidence in the cause.

2. Because the verdict was greatly against the weight of the evidence.

3. Because the Court erred in admitting as evidence, an exemplification of the record of a suit in Gilmer Superior Court, against Enoch Patterson, for the land in dispute.

4. Because the Court erred in admitting as evidence, the Power of Attorney from McKinney to Whitlow, without proof of its execution.

5. Because the Court erred in charging the Jury "that if Enoch Patterson entered under a joint bond to himself and John Patterson, with a transfer from John to Enoch, such transfer from John to Enoch for full payment, would make

Payne vs. McKinney and Whitlow.

Enoch's possession adverse to John Patterson, but not adverse to McKinney."

6. Because the Court erred in charging the Jury that if land be sold by the Sheriff, and the defendant afterwards takes possession, claiming the land as his own, the right of the purchaser is barred in seven years.

There were several other grounds taken in the motion which it is not necessary to set out.

The motion was overruled by the Court, and the Judgment is assigned as error.

WALKER; MARTIN, by IRWIN and LESTER, for plaintiff in error.

BROWN and EZZARD, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the Power of Attorney made by McKinney to Whitlow, and witnessed only by a Justice of the Peace, admissible in evidence upon the fact merely of its having been recorded without other or further proof of its execution?

Conceding that it operated as a conveyance, and that one witness was sufficient to constitute it a good deed, still there is no Law which entitles it to registration upon the attestation of a single witness, although he be a magistrate. The Act of 1839, applies only to deeds made prior to that time.

The main question in this case, is this: Can the vendor of lands avail himself of the possession of his vendee, especially when he repudiates the title of his vendor to perfect a Statutory title by adverse possession?

It is true, the Books treat the vendor and vendee under a bond for titles, as occupying the *quasi* relation of landlord and tenant. But not, we apprehend, for the purposes contended for in this case. The tenant stipulates to hold the premises for his landlord proper, and to return it at the expiration of the lease: not so the vendee—and while he holds the land in subordination to the title of the vendor, still he holds it as an absolute purchaser, and never contemplates a surrender, and each party is remitted to his respective rights resulting from the executory contract.

Adams and Carroll vs. Keeler et al.

ADAMS AND CARROLL vs. KEELER et al.

Executions issued from a Justices Court against Ward Keeler and John M. Jordan, jointly, on which appeared the following entry, "Received payment in full on the within fi fa, by John M. Jordan, security. January 8, 1839. E. L. Harris, J. P." Held, that such entry did not give the control of the executions to Jordan as surety against Keeler, the co-defendant, but the same operates as a satisfaction as against each of the defendants, and that a subsequent levy and sale of the property of Keeler, under said executions, was illegal and void.

Ejectment, in Gilmer Superior Court. Tried before Judge RICE, at December adjourned Term, 1859.

This was an action of Ejectment by Doe, *ex dem*, Thomas H. Turner and Ward Keeler, against Roe, casual ejector, and — Adams and Daniel Carroll, tenants in possession, for the recovery of lot of land No. 33, in the 7th district and 2nd section of Gilmer county.

Plaintiff read in evidence a grant of the lot from the State to Thomas H. Turner, dated 20th December, 1837, and a deed from Turner, conveying the lot to Keeler. The possession by defendants was admitted.

Defendants claimed under a sale and conveyance by the Sheriff of Gilmer county, under three Justice executions from Crawford county, against Keeler and John M. Jordan, in favor of one Matthew H. Myrik. The executions were all dated first of January, 1839, and upon each was the following endorsement:

"GEORGIA, CRAWFORD COUNTY—

Received payment in full on the within fi. fa., by John M. Jordan, security. January 8, 1839.

[Signed]

E. L. HARRIS, J. P."

The lot of land was levied upon by virtue of said Justice fi. fas. December 15, 1849, and sold by the Sheriff to one B. A. Freeman, to whom titles were executed by said Sheriff.

Defendants offered said fi. fas. and deed in evidence. To the introduction of which plaintiff objected, on the ground that it appeared by the endorsements on said fi. fas., that they had been fully paid off and satisfied, and that there was no authority for said sale and conveyance by the Sheriff.

The Court sustained the objection, and excluded the evidence, and defendants excepted. The Jury found for the plaintiff, whereupon defendant tenders his bill of exceptions assigning said decision as error.

D. A. WALKER, by IRWIN and LESTER, for plaintiffs in error.

WM. MARTIN, by EZZARD, *Contra*.

By the Court.—LYON, J., delivering the opinion.

The Executions having been issued against the defendants, Ward Keeler and John M. Jordan, jointly, a payment by one was a satisfaction. If Jordan was, in fact, but a surety for Keeler on these debts, which were the foundation of the executions, he ought, after this payment, to have made such fact "satisfactorily appear to the Court from whence the executions issued," when that Court would judicially have given to him the control. *Cobb's Dig.* 595. Not having done so, he had no right to control the executions against his co-defendant. Hence, the subsequent levy and sale of the lot in controversy under these executions, as the property of Keeler, was illegal and void, and conveyed no title to the purchaser at such sale.

It is insisted by counsel for plaintiff in error, that the entry made by the Justice of the Peace, the same who issued the executions "of payment from Jordan, security," is a substantial compliance with the Act before referred to, sufficiently so, at least, to give Jordan control of the executions against Keeler. We do not think so. These entries were made by the Justice of the Peace as receipts for the money paid to him for the plaintiff in execution, and as a collecting officer—not as a Court. It does not appear to have been done in Term time, or upon proof that Jordan was but surety; all of which is fatal to the position of counsel.

Judgment affirmed.

FINDLEY vs. LAWLESS.

In an application for Dower since the Act of 21st February, 1850, no person but the administrator of deceased, can be made a party to the proceeding for the purpose of contesting the right of the widow to have Dower assigned her.

Dower, in Dawson Superior Court. Decision by Judge RICE, at February Term, 1860.

Nancy Pinion, widow of Stokes Pinion, deceased, made application to the Superior Court of Dawson county, for the appointment of commissioners to lay off and assign to her dower in lands, of which she alleged her late husband died, seized and possessed. Due and legal notice of this application was given to Calvin J. Lawless, the administrator of said deceased, and objection made, Commissioners were appointed as provided by Law, who made their return to the next Term of said Court, assigning dower in said land to the said Nancy. At this Term of the Court, Samuel R. Findley appeared and filed his objections to said return, and to its being made the Judgment of the Court upon the grounds:

1st. That said Nancy Pinion had never been married to said Stokes Pinion, deceased.

2nd. That said land had been legally sold by said administrator, and bought by said Findley.

The presiding Judge held and decided that, this being a proceeding between the widow and the administrator, to which Findley was not a party, he had no right to be heard in this form, and ordered the return of the Commissioners to be made the Judgment of the Court, to which decision counsel for Findley excepted.

WM. MARTIN, represented by EZZARD, for plaintiff in error.

IRWIN and LESTER, *Contra*.

By the Court.—LYON, J., delivering the opinion.

The only question in this case, is this: Whether, upon the application of a widow for dower, she having given notice of

such intention to the administrator of her deceased husband, a third person, on his own motion, can come into Court, cause himself to be made a party to the proceeding, and resist her right to have dower assigned to her? The Court below decided that he could not, and we concur in that opinion.

By the Act of 7th of December, 1824, *Cobb's Dig.* 228, any person interested in the lands upon which the widow claimed dower, could traverse and deny the right of the applicant. When an issue was formed and tried by a special Jury, under the provisions of that Act, the widow was required to give notice of her intended application to all persons interested in the land. This made them proper parties to that proceeding, and entitled them to be heard; and the Judgment of the Court making the assignment, concluded all parties affected with notice. The Act of 21st February, 1856, *Cobb* 231, very materially changed the Law in relation to the assignment of dower. By that Act, it is only necessary for the applicant to give notice to the representative of the estate of the deceased person in whose land the dower is claimed, instead of to all parties interested, as heretofore. No provision is made for bringing in third persons, and adjudicating their rights in respect to the land, nor does that seem to have been contemplated. The intention of the Legislature evidently was, to provide a more simple and summary remedy, for the assignment of dower to the widow, than that previously afforded by Law. And if the Court allowed her application to be thwarted and delayed by litigation with adverse claimants, or others, the object of the Law would be defeated. The right of such third persons cannot be affected by the judgment to which they are no parties, unless they claim as heirs at Law, or from the administrator, and in that case, they must litigate through the administrator and through him only.

Judgment affirmed.

GLOVER vs. TOWNSEND, CRANE & CO.

4. A proposition to which the Judge expresses his assent during the argument to the Jury, and in their hearing, conveys the Judge's opinion to the Jury as effectually as a formal charge could do, and may equally serve as a foundation for the assignment of error.
2. A representation that a person may be safely credited, can not give a right of action, without some indication in the representation, or its circumstances, of the extent to which the credit may go.

Deceit, in Cobb Superior Court. Tried before Judge HAMMOND, at March Term, 1859.

This was an action on the case brought by Townsend, Crane & Co., against John H. Glover, to recover damages for deceitful representations, respecting the solvency of one Samuel Lawrence, whereby they were induced to sell goods to Lawrence, and, on account of his insolvency, they lost their debt.

SAMUEL CORRIE, in behalf of the plaintiffs, testified: That he was clerk and salesman for Townsend, Arnold & Co., Wholesale Dry-goods Merchants, in the city of Charleston, South Carolina; that the plaintiffs are the successors of Townsend, Arnold & Co., in the same business, and that witness continued with plaintiffs as clerk and salesman; that in April, 1851, Samuel Lawrence, then a merchant of Marietta, visited Charleston to buy goods for his business, and applied to the House of the plaintiffs to purchase a Bill of Dry Goods; that plaintiffs doubting the solvency of Lawrence, were not willing to sell him the goods on credit until the defendant, John H. Glover, who was in Charleston at the time, affirmed to the witness, then clerk and agent of plaintiffs, that "Lawrence was good for his purchases; that he was all right, and that witness must sell to him on fair terms, do a good part by, and treat him right." That, upon the faith of this and similar representations, and affirmations, repeated several times on different occasions by Glover, witness sold goods to Lawrence on a credit, amounting in value to the sum of \$1,261.91, for which the note of Lawrence was taken, due at six months. That Glover was particular to inform witness as to the solvency of Lawrence, and urged him to sell the goods to Lawrence, which witness did entirely and altogether

upon the faith of and his confidence in the representations of Glover, that Lawrence was solvent and good for his purchases, and all right, and that the goods would not have been sold and delivered, but for the representations. As clerk of Townsend, Arnold & Co., witness had sold Lawrence a small bill of goods on a credit, amounting to some two hundred and eighty dollars, taking his note therefor, due at six months, which was paid in April, 1851. Plaintiffs also proved, that Lawrence was sued on the note first aforesaid in the United States District Court, and confessed a judgment which is still unpaid; that Lawrence removed from South Carolina to Marietta, Georgia, in the fall of 1848. At that time, he was largely insolvent, having no property, except an old decrepit negro woman, only retained on account of her past services as a family servant, and who has since died; that when he came to Marietta, he bought a stock of goods from John H. Glover, and agreed to pay him therefor, the sum of ten thousand dollars, and gave him a lien in the nature of a mortgage on the goods, books of accounts, &c., to secure the payment of the purchase price; that Lawrence continued in the mercantile business during the years 1848, 1849, 1850, and until the fall of 1851. That whilst engaged in said business, he purchased two lots in Marietta, on which he built houses worth seven or eight thousand dollars, which were paid for out of the proceeds of his mercantile business.— That Lawrence never had any property in Georgia, except said stock in merchandize and the negro woman aforesaid of no value; and, at the time this case was tried, he had no property that his creditors could touch. There was some conflict between Corrie, witness for plaintiff, and Lawrence, witness for defendant, as to whether Lawrence bought the goods in person, or through an agent by the name of Moyer. There was also, some proof as to the disparity in size and appearance of Lawrence and Moyer. It was also proven, that in the fall of 1851, Lawrence closed up his mercantile business in Marietta, and that Glover got all he had, including houses and lots, remnant of goods, notes, books of accounts, &c., and that he was still short with Glover some \$3,000.

The Jury returned a verdict in favor of the plaintiffs for \$1,919 17.

Counsel for Glover then moved for a new trial on the grounds:

Glover vs. Townsend, Crane & Co.

1. Because the Judge, who tried the case, erred in this, to-wit: When the concluding counsel for the plaintiffs opened his argument by stating to the Court and Jury, that "if Glover represented Lawrence as good for his debts, and solvent, then the plaintiffs are entitled to recover, if it is proven that Lawrence was insolvent, and that Glover knew it at the time of the sale, and plaintiffs acted upon the faith of the representations." His Honor replied, in the presence and hearing of the Jury, in a decisive manner, that "plaintiffs' counsel need not discuss that question, that the Court recognized that to be the Law."

2. Because the finding of the Jury was contrary to Law and contrary to the evidence.

The Court overruled the motion and refused the new trial, and this decision is alleged to be erroneous.

IRWIN and HANSELL, for plaintiff in error.

LESTER, for defendant in error.

By the Court.—STEPHENS, J., delivering the opinion.

1. There was some controversy in this case, as to whether or not a proposition, to which the Judge expressed his assent during the argument to the Jury, and in their hearing, ought to be regarded as a charge on which error may be assigned. We think it ought to be so regarded, for the remark put the Jury in possession of the Judge's opinion as effectually as a formal charge could have done.

2. The substance of the remark, or charge, was that there was nothing wanting to complete Glover's liability if he had made the false representation, knowing it to be false, and the credit had been given to Lawrence on the faith of it. This omits another element necessary to the right of action, and that is some indication, either in the representation, or in the surrounding circumstances, of the *extent* to which the credit may safely go. If the representation, as illustrated by the circumstances, does not point with reasonable certainty to the amount of the expected credit, it ought not to serve as a foundation for any credit at all. A reasonable man would not act on it. The person who knowingly makes a false representation, is responsible for the legitimate appropriate con-

Jones et al. vs. Kerr and Hope.

sequences of his falsehood, but not for the consequences which another's folly or imprudence may tack to it. This same principle was distinctly held by this Court in the case of *Hopkins, Allen & Co. vs. Cooper and Gilliland*, 28 *Ga. Rep.* 392.

Judgment reversed.

JONES et al vs. KERR & HOPE.

1. If a party act as the agent of another, and not as an Attorney at Law, his testimony is not objectionable; and if he be made a co-defendant to a Bill with his principal, and die, the evidence given in by him on a former trial at Law, between the same parties, and concerning the same subject matter, may be testified to.
2. If a plaintiff in a *fi. fa.* take a new note for his judgment debt, with security, undertaking to deliver the original execution to the securities for their indemnity, and fail to do it, and who, in consequence thereof, lose the money, they are entitled to their discharge.

In Equity, in Gilmer Superior Court. Tried before Judge RICK, at December Term, 1859.

This was a Bill filed by Samuel Jones and William Cox, administrators of Jonathan Cox, deceased, against Kerr & Hope, to enjoin an action at Law, and for discovery.

The bill alleges, substantially, that Jones and Jonathan Cox, were induced to become the sureties of one A. J. Williams on a promissory note, payable to Kerr & Hope, which note was given in lieu, or payment of a *fi. fa.* held by Kerr & Hope against said Williams, and was signed by said Jones and Cox, as his securities, under the agreement and upon the condition that said *fi. fa.* should be assigned by said Kerr & Hope, to them. That this matter was negotiated, and arrangement made, with one Beverly A. Freeman, Esq., the Attorney of Kerr & Hope. The bill further states, that

Jones et al. vs. Kerr & Hope.

Kerr & Hope have failed and refused to assign said *fi. fa.* agreeably to their contract, and are prosecuting their action at Law against complainants and Williams on said note; that on the trial of the action at Law, on the Appeal, complainants offered said Freeman as a witness to prove the terms and circumstances upon and under which said note was signed, and defendants objected to this testimony upon the ground, that Freeman was their Attorney at the time, and acquired his knowledge of the facts proposed to be proved by him while he was their Attorney, and which objection the Court sustained, and refused his testimony, and the case was continued. The bill further alleges that complainants cannot establish their defence at Law, without a discovery from defendants, and call for the letters that they received from Freeman relating to this matter, and they pray that in the meantime the action at Law be enjoined.

The cause was heard upon the bill, answer and proofs.

Upon the trial, complainants proposed to prove what Freeman testified to upon the trial of the Common Law action. (It was admitted that Freeman had died since.) Counsel for defendants objected, and the Court sustained the objection and repelled the testimony, and complainants excepted.

The Court, amongst other things, charged the Jury, that if the note was given to secure the debt due by Williams to Kerr and Hope, on the *fi. fa.*, and Jones and Cox were his securities, then William's debt was the consideration of the note, and the securities had no interest in the consideration thereof; and if there was an agreement that the *fi. fas.* should be handed over or transferred to Jones and Cox, that agreement was no part of the consideration of the note, and their failure to transfer the *fi. fa.* will not authorize the Jury to find for the complainants. To which charge counsel for complainants excepted.

The Jury found and decreed for the defendants, whereupon counsel for complainants tender their bill of exceptions, assigning as error the foregoing ruling and charge.

WM. MARTIN, represented by EZZARD, for plaintiffs in error.

No counsel appeared for defendants in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Freeman acted in this transaction as the agent, not as the Attorney at Law, of Kerr & Hope. His testimony, therefore, given on the Common Law trial, was legal, and would have been admissible, had it been objected to; as it was not, his answer to the bill, if in life, as a co-defendant, could not be excluded, and could be used against his principal. Being dead, his original answers are to be received as the sworn statements of a competent witness—perhaps more than this, of one of the parties to the contract with the complainants.

As to the charge of the Court, that the indebtedness of Williams was the consideration for the new note, and not the undertaking of the agent of the payee, to cause the fi. fa. to be transferred to the securities to the new note, we understand the Law to be this: If the creditor neglects to perform or performs defectively any of the conditions, either express or implied, which are incumbent upon him, or any of the terms which collectively form the consideration of the security's contract, or of the contract to which the security acceded, the surety is discharged, or rather his liability never attached. *Theobald on Principal and Surety*, 103. *Burge on Suretyship*, 115.

But for the promise to deliver the execution against Williams, to the sureties to indemnify them against loss, the presumption is, they would not have consented to be bound. If the creditor failed to do this, are they not discharged?

Chastain vs. Smith et al.

CHASTAIN vs. SMITH et al.

1. Where one person agrees, as agent, to buy land for another as his principal, and does buy it, but takes the title in his own name, this title in his hands stands affected with a resulting trust for the benefit of the principal by operation of Law, and the case is not within the Statute of Frauds, resulting trusts being expressly excepted from the operation of the Statute.
2. Equity will decree the whole performance of an agreement which is within the Statute of Frauds, whenever there has been such a part performance as that the whole performance is necessary to prevent a fraud; and the whole performance is necessary to prevent a fraud in a case where the parties have proceeded so far on the faith of the agreement, that they can not be restored to their *statu quo* nor adequately compensated in damages, by avoiding the agreement and leaving them to their action for damages.

In Equity, in Fannin Superior Court. Tried before Judge RICE, at October Term, 1859.

This was a Bill by Elijah W. Chastain, against Jacob Smith, Henry Smith, and George Smith, to compel the specific execution of an agreement relating to the sale and division of a lot of land, situated in the county of Fannin.

The bill alleges, in substance, that complainant and defendants entered into a parol agreement to purchase of one Lovingood, a certain lot of land adjoining complainant, and that whichever party should actually buy the land from Lovingood, the same should afterwards be divided so as to give to complainant a certain part adjoining him, designated by certain lines and courses, &c.; and that for the portion thus received by complainant, he was to pay the sum of seventy-five dollars.

The bill alleges that the Smiths negotiated the sale with Lovingood, and agreed to give him four hundred dollars for the lot, and that they made valuable improvements on it, but Lovingood refused to carry out the agreement, and they filed their bill against him to enjoin his action of ejectment and to compel him to execute titles agreeably to their agreement. That they succeeded in their bill, and obtained a decree requiring and compelling Lovingood to make titles upon the payment by the Smiths of five hundred dollars. Complainant alleges that, being admitted to practice as an Attorney at Law, soon after this litigation commenced, he rendered val-

able services to the Smiths as an Attorney and Solicitor in said Equity cause, and for which he made no charge, being personally interested in and benefitted by said decree as a part owner of the land thus recovered, and his services being by agreement a part of his contribution towards the cause; that his services were worth seventy-five dollars. That defendants, although they have received titles under said decree from Lovingood for said land, refuse to comply with the terms of said agreement, and to make to complainant titles for his portion of said land, and absolutely deny his right to any part thereof. Complainant offers to pay his proportion of the purchase money, and prays that defendants be compelled to execute titles to him for that portion of the lot which by said agreement he was to have.

The case was heard upon bill, and answers, and proofs.

The Court charged the Jury, amongst other things, that such part performance of this agreement as would entitle complainant to its specific execution, must be possession of the premises, payment of the purchase money, and the making of valuable improvements. To which charge complainant excepted.

There were other rulings and charges in the case to which complainant excepted, but as the Judgment of the Court below is reversed upon the ground of error in the above stated charge, it is unnecessary to insert others upon which no opinion was pronounced.

The Jury found for the defendants, and complainant tenders his bill of exceptions, &c.

WM. PHILLIPS, for D. A. WALKER, for plaintiff in error.

WM. MARTIN, by EZZARD, *Contra*.

By the Court.—STEPHENS, J., delivering the opinion.

The only question presented in this case, is: whether or not the Statute of Frauds is in the way of the specific performance prayed by Mr. Chastain.

I. In the first place, this case was never within the Statute of Frauds. The substance of the agreement, so far as that particular part of the land to which Mr. Chastain seeks a title is concerned, is that the Smiths would, as his agents, buy it for him. They did, in fact, buy it, but took a title to

themselves. This title in their hands, was immediately affected with a resulting trust for his benefit by operation at Law. Now, a trust raised, or resulting by operation of Law, is expressly excepted from the operation of the Statute, and this case, therefore, was not within the Statute from the beginning.

2. In the second place, even if the agreement had, at first, been within the Statute, we think it was error in the Judge to instruct the Jury that the only part performance which could take it out of the Statute, was possession of the land delivered to Chastain, *and* the purchase money paid by him, *and* improvements made on it by him; all done in pursuance, and upon the faith of the agreement. Now, the case made by Mr. Chastain was, that in pursuance and upon the faith of the agreement, he had contributed his professional services, worth seventy-five dollars, towards the acquisition of the title which the Smiths got, and that they were *insolvent*, having nothing out of which to compensate him for those services, except only this very land which they were claiming to hold exempt from sale under execution, by virtue of the Statute which allows a defendant in execution, to hold a certain quantity of land exempt from sale. That is to say, the case is, that they having already received the benefit of his services, and being both unable and unwilling to pay him for them in money, now ask to be protected from their contract to turn over to him the fruit of those services, upon the ground that the contract was not in writing. This would be to convert the Statute, which was intended to prevent fraud, into an instrument of fraud. Whenever there has been such a part-performance as that the whole performance becomes necessary to prevent a fraud, Equity will decree the whole performance; and whenever the parties can not be restored to their *statu quo*, nor adequately compensated in damages by avoiding the contract and turning them over to their action for damages, it would be a fraud to refuse to execute the contract, and Equity will order it executed. Such would be the result of a refusal in this case. Mr. Chastain's action for damages would be fruitless, because the Smiths are insolvent; and the only possible mode of preventing them from making a fraudulent appropriation of his services without paying him for them, is by compelling them to execute the agreement on the faith of which the services were rendered.

Judgment reversed.

Mason and Field, Jr., vs. Force, Brothers, & Co. et al.

poration"; it was also, shown that David H. Mason transferred his stock in the Company one year and eight days before any of the suits were instituted; and that Zelotes H. Mason also, transferred his stock seven months and eighteen days before the commencement of any of the suits; neither of the Masons gave notice of the transfer of stock in any newspaper.

The presiding Judge charged the Jury, that: "As the Act incorporating the Dahlonaga Tanning and Leather Manufacturing Company provided that 'any *fieri facias* issued against the corporation, might be levied and collected upon and out of the private property of any stockholder, or stockholders, in the incorporation' if the plaintiffs have shown a regular judgment against the corporation and a *fi. fa.* issued therefrom, and have also, shown that Mason was a stockholder in that corporation, his private property is subject to levy and sale under the execution, notwithstanding he may have transferred his stock in the Company before the commencement of the suit, and *before the creation of the debt*, unless he gave notice once a month for six months of such transfer, and immediately after such transfer, in two newspapers in or nearest to the place where the principal office of the Company was kept at the time."

To this charge the Masons, by their counsel, excepted, and alleged the same to be erroneous.

The Jury found the issue in favor of the plaintiffs.

GEORGE N. LESTER, for the plaintiffs in error.

MARTIN, by EZZARD, *Contra*.



By the Court.—LYON, J., delivering the opinion:

1. Were the plaintiffs in error stockholders in the Dahlonaga Tanning and Leather Manufacturing Company, or liable as such for the debts of the Company? This question was made in a case between the same parties in 22 Geo. 86, in which this Court held, that they were not only stockholders originally—for this fact appears in the charter—but that they were liable as such for the debts, unless they could allege and prove that they had been discharged from such liability according to the provisions of the second section of the Act

of 29th December, 1838, *Cobb* 112, that is, by a transfer of their stock and a publication thereof in two newspapers in or nearest the place where the corporation kept its principal office, once a month for six months, immediately after such transfer. The plaintiffs did offer proof of the transfer of their stock in the Company, but they did not show or attempt to do so, that they had published notice of such transfer in terms of that Act. And as the 2nd section of the Act of incorporation of this Company makes "the private property of the stockholders bound for the payment of the debts of the Company," the question is settled that the plaintiffs, as stockholders, are liable for the debts of the Company.

2. Were the plaintiffs entitled to personal services or notice of suits against the Company before judgment, in order to render their individual property liable for seizures under executions against it? To determine this question, reference need only be had to the Act of incorporation. By the 3rd section of that Act, it is enacted, "That any *feri facias* issued against said incorporation, may be levied and collected, and out of the private property of any of the stockholders in said incorporation." Therefore, no such notice of the suit, or service of the process upon the stockholder, is required or was necessary by that Act. It is only necessary that execution should legally issue against the incorporation, that is, that the incorporation itself, not its members, should be legally served, a judgment properly rendered against it. A *feri facias* issued from such judgment might be levied and collected out of the private property of the stockholder. The Legislature clearly intended that a service on the incorporation should be good as against the stockholder, that a judgment and execution good as against the incorporation, should be such against the individual members thereof. Such is the enactment. The stockholders cannot complain. They accepted the charter, enjoyed its privileges, and they must now stand by all its terms and bear all its burdens. But what is the necessity of such service or notice? What plea or defense could the stockholders, as such, have made to the suits, had they been served, that the incorporation did not make or ought to have made? They are liable for the debts. These are debts, so declared to be by the judgment of the Court, and nothing more was necessary than to provide a means for their enforcement. This was done by *feri facias*. The same

Adair et al. vs. Adair.

way precisely, and no other, that is provided by Law for the enforcement of all other debts against other persons.

These are the only questions made in the record, and as there is no error, the judgment of the Court below must stand affirmed.

ADAIR et. al. vs. ADAIR.

1. When a Will is prepared by one who takes a large benefit under it, it cannot be set up without strong proof that the testator understood its provisions and assented to them.
2. When a legal charge is requested upon the main point in a case, but is unintentionally omitted by the Judge, and not suggested by counsel, when called on at the end of the general charge to suggest omitted points, a new trial ought to be granted.

Caveat to Will in Paulding Superior Court. Tried before Judge HAMMOND, March, 1859.

This was a Caveat filed by John B. Adair and others, heirs at Law, to a paper propounded as the last Will and testament of Bozeman Adair, deceased.

The grounds of Caveat, were in substance as follows :

1. That deceased was not of sound and disposing mind and memory at the time he executed said alleged last Will and Testament.
2. That said Will was procured, and deceased induced to execute the same, by the undue and unlawful influence of James L. Adair and Mitchell S. Adair, principal legatees in said Will, and sons of deceased ; said influence exercised at a time when deceased was extremely weak and imbecile from old age and sickness.
3. That deceased was induced to sign said paper by the false and fraudulent representation made to him by said

Adair et al. vs. Adair.

James L. and Mitchell S. Adair, in relation to the conduct of the other children of deceased, and the advancements made to said children, and the value of the estate of the deceased.

The case came on for trial in the Superior Court, the appeal from the Judgment of the Ordinary, rejecting the paper propounded as the last Will and Testament of Bozeman Adair deceased.

On the trial, it was proven that at the time the alleged Will was executed, deceased was very weak and feeble, and about eighty-six years of age; he spoke very low. The Will was read once to him, and he was asked, if it was right, he replied, "*That is the way.*" The paper was then presented, the "rest" upon which the old man leaned, was removed, and a table put in its place; deceased then wrote his name, with the help of one of the witnesses, who guided his hand.

Solomon L. Strickland, the draftsman, and one of the witnesses to the will, proved substantially that James L. Adair called on him to write a will for his father, the deceased, and told him how to write it, saying that "he knew how the old man wanted it written." Witness wrote the will, and went with James L. Adair and Mitchell S. Adair, and the other two witnesses to testator's house. Witness spoke to the old man and said, "Grand-sire, do you know me?" Testator replied, "No, who are you?" witness said, "Strickland." Witness then told him that he had a paper to read to him, and did read the Will to him in a slow and distinct tone. After witness had read the Will, he asked the old man if it suited him, he said, "that's the way I want it." He was sitting before the fire and his head was leaning on a fixture made of two upright pieces and a piece of cloth, it might be called a rack. He was very weak and feeble, and the rack was removed and a table put in its place; witness put the pen in his hand, and guided his hand while he signed the Will; witness then subscribed as a witness with Lane and Cole.

Upon cross-examination, he testified that he wrote the will in his office, because his writing fixtures were convenient there, and he could write it better there than at testator's house. Witness never had any correspondence with testator on the subject of his Will before James L. Adair called on him as above stated, to write the Will; he wrote the Will as directed by James L. Adair. To the question, whether he thought testator was, at the time, of sound and disposing mind and memory, witness said, "That is a tight question."

Much other testimony was introduced both by propounder and caveators, but the foregoing is sufficient to understand fully the exception taken to the rulings of the Court, and to its refusal to charge as requested, and the opinion of this Court upon the errors assigned.

The Jury found in favor of the Will, and counsel for caveators moved for a New Trial upon the following grounds :

1. Because the verdict was contrary to Law and the evidence.

2. Because the Jury found contrary to the charge of the Court.

3. Because the Court erred in failing to charge the jury as requested by counsel for caveators, " that the presumption is strong against a party preparing a Will, who takes a benefit under it, and although it will not be declared void on that account, strong evidence of intention in such a case will be required."

4. Because the verdict of the Jury does not find the issue submitted to them, in favor of, or against either party. (The verdict was in the following form, " We the Jury agree that this is Bozeman Adair's will.")

5. Because the Court refused to allow the Jury to be polled upon the motion of counsel for caveator.

The Court refused the motion for a New Trial, and caveator excepted, and assign said refusal as error.

CHISOLM & WADDELL; MILLER & PARROTT, for plaintiffs in error.

IRWIN & LESTER, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

There is one ground on which we think a New Trial ought to have been granted in this case: the failure of the Judge to charge as requested, that where, as in this case, the Will is prepared by one who takes a large benefit under it, the Will cannot be set up without strong proof that the testator understood its provisions and assented to them. That this charge as asked is sound Law, and that it was applicable to the case, are propositions not disputed in the argument. The real controversy touching this point, was as to the proper con-

struction of the Bill of Exceptions. The Bill of Exceptions states that the charge was asked and was not given. A note to it adds that the Court recognized it as law, and after concluding his general charge, inquired of counsel whether there were any other points on which they desired a charge, and that they replied there were none. This note does not vary the original statement that the charge was asked and was not given. It does say that the Court *recognized* it as Law, but it does *not* say that he *charged* it as law. The Court's recognition of Law becomes a guide for the Jury when expressed to them, and not before. Then the charge was not given. Was it waived? The exact truth of the case is, that it was not waived, but *forgotten* by the Judge and by the counsel. If the Judge had thought of it, he would have given it, for he recognized it as law. If counsel had thought of it, they would have suggested it, when requested to suggest any other points not covered by the general charge, for their case turned on it. Our conclusion is, that the case was submitted to the Jury without any instruction upon the main point in it, by an unintentional omission of the Judge; the omission committed by him, and not corrected by the counsel, because they happened to slip into a like momentary trick of the memory. The case was not tried on its merits. The failure, if the fault of anybody, was as much the fault of the Judge as of the counsel; and we think he ought to have granted a New Trial on account of it. There is no need to express any opinion upon the other grounds of error, for they involve no general principle, and cannot recur upon the new hearing. As to the point upon the weight of evidence, we will remark, that in our judgment, the evidence was such as not to authorize the Court to set aside a verdict which might have been found either way, if the case had been legally and fully submitted to the Jury.

Judgment Reversed.

Benson vs. Griffin.

BENSON vs. GRIFFIN.

A representation by the seller of a horse, that a sore on the horse's eye was caused by a mule bite, is not so overcome by mere opinions to the contrary, founded on the appearance of the sore, as to require a Jury to find that the representation was false.

Certiorari in Carroll Superior Court. Decision by Judge HAMMOND, at the October Term, 1859.

Griffin, as bearer, brought suit against Benson, in a Justice Court, on a promissory note for forty dollars. The note was given by Benson for a horse, which he had purchased. Defendant pleaded the general issue and failure of consideration, in that the horse bought, and for which the note was given, was unsound.

The Jury, in the Justice Court, found for the plaintiff the full amount of the note, and defendant sued out certiorari to review and correct said finding, on the ground that it was against the evidence.

The Court, after argument, dismissed the certiorari, and counsel for Benson excepted and assign said decision as error.

BURKE & BLACK, for plaintiff in error.

GLENN & COOPER, representing the MERRELLS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

There was no warranty in the sale of this horse, but on the contrary, an express refusal to give one. The defence to the note must then rest solely upon the misrepresentation of the seller. His statement was that the sore on the horse's eye was produced by a mule bite. The only evidence tending to invalidate this statement, was the *opinion* of a horse doctor, and the opinions of some other non-professional people. These opinions were founded on nothing but the appearance of the sore, which had got to be an old and bad one before it was examined by the witnesses. The Jury by their verdict have said that these opinions resting on such a

foundation, were not sufficient to establish the falsehood of the representation ; and we can not say that they were constrained by the evidence to take a different view.

Judgment affirmed.

CONNELL vs. CULPEPPER & BOON.

In an issue of fraud where the Court and Jury who tried the case, have passed upon it, and this Court is satisfied with the result, a new trial will not be awarded.

Claim in Carroll Superior Court. Tried before Judge HAMMOND, at the October Term, 1859.

This was a claim cause between George T. Connell, the assignee of an execution in favor of Alexander Price and Culpepper and Boon, claimants of the store-house or grocery, levied on under and by virtue of said fi. fa., as the property of Charles Rodahan. The execution was against Charles Rodahan, John Rodahan, and Terrence Connell, principals, and Joseph A. Thrasher, security on the appeal. The execution issued from the Superior Court of Henry County, and was for \$535.00, besides interest and cost, and bore date 12th January, 1857. It was levied upon the property in controversy by the Sheriff of Carroll County, 27th January, 1859.

Plaintiff, the assignee of the execution, first tendered it in evidence, and proved by the depositions of L. T. Doyal, Esq., the assignment of said fi. fa., that he gave his note for the full amount with A. W. Turner and Willis Goodwyn, securities. Don't know whether the note has been paid or not, it has been sued to judgment. At the time of the transfer defendants were considered insolvent—don't know whether defendants placed any means in Connell's hands to pay the debt. Turner and Goodwyn are perfectly solvent.

Connell *vs.* Culpepper & Boon.

Plaintiff then proved that Charles Rodahan was in possession of the house levied on, in July, 1856, and closed.

Claimants introduced and read in evidence a deed of conveyance from Charles Rodahan for the property levied on; dated 6th January, 1857, and recorded on the same day. Claimant also, amongst other things, tendered in evidence, an order from the Superior Court of Carroll County, dated 27th November, 1857, directing the Treasurer of said county, to pay George T. Connell, fifteen hundred and fifty dollars, the 1st February, 1858, and two thousand dollars on 1st February, 1859, for work done up to that time on the Court House of said county by John Rodahan. Counsel for plaintiff objected to this evidence as irrelevant; the objection was overruled, and the order received in evidence.

Claimants then tendered in evidence the Tax books, for the years 1857 and 1858, from which it appeared that the taxable property of plaintiff for the year 1857, amounted to \$5,040, and for 1858, it was \$17,825; and that the taxable property of Charles Rodahan amounted in 1857 to \$5,618, and that in 1858, he was a defaulter. To which evidence, counsel for plaintiff objected, on the ground of its irrelevancy. The Court overruled the objection, and admitted the Tax-books in evidence. After the introduction of other testimony not material to be set out, claimant rested.

Plaintiff then read the depositions of Hardy Duke, and a written agreement, as follows:

GEORGIA, CARROLL COUNTY: Know all men by these present, that I, John Rodahan, of the county of Henry, and State aforesaid, have this day transferred to George T. Connell of the County of Carroll, a claim or account on the County of Carroll, a balance due to the said Rodahan, amounting to five thousand and fifty dollars, the money arising from said account to be paid to the following debts:

One thousand dollars to James Gray of the County of Carroll, and nine hundred and sixty-three dollars to John M. Stewart, of the County of Carroll, and the sum of three hundred and thirty-two dollars to McKay and Amspow for plastering Court House, and one hundred and sixty dollars to Joseph Sykes, for work on Court House, and also ninety-five dollars to Jacob Morton for work on Court House, also, four hundred dollars to E. M. Beck, of the County of Spauld-

Connell vs. Culpepper & Boon.

ing, and the further sum of five hundred dollars to Cary M. Wood of the County of Newton, and three hundred and eighty-four dollars to A. J. Boggess, of the County of Carroll, and the further sum of two hundred dollars to Thomas Wells, of the County of Carroll, also, fifty dollars to Wm. Johnson of the County of Carroll, also, fifty dollars to Charles Hilton, of the County of Carroll, also, the further sum one hundred dollars to John T. Mador, of the County of Carroll, and the further sum of two hundred and fifty dollars to A. Nonderville, of Carroll, and also, three hundred dollars for the completion of said ———, and the sum of fifty-six dollars for interest that has accrued on the Cary Wood, and Erasmus Beck notes.

The money arising from this claim to be paid to these specified debts, and to no others. I, George Connell, of the County of Carroll, bind myself, my heirs and assigns unto the said John Rodahan, and his heirs and assigns, that the five thousand and fifty dollars shall be applied to the specified claim, set down in this receipt.

November 25th, 1859.

GEORGE T. CONNELL.

Test: H. H. DUKE.

This article of agreement to remain in the hands of Hardy H. Duke until called for by said John Rodahan or his assigns or executors.

Dukes proved that he signed said agreement as a witness, and Connell signed it, and it was delivered to him by the parties, and that the balance of the \$5,050.00, not required for the payment of the debts specified, was to be applied to John Stroud's claim for interest.

Plaintiff then proved the payment by him of various debts against the Rodahans; and the case was submitted to the Jury upon the charge of the Court, who returned a verdict in favor of the claimants, and counsel for plaintiff moved for a new trial upon the following grounds:

1. Because the Court erred in charging the Jury, that the first point for their consideration was, whether the property levied on belonged to defendants in *fi. fa.*, and if they so believed in the absence of qualifying circumstances, they should find the property subject to the *fi. fa.* But claimants have introduced evidence for the purpose of showing that Connell, the assignee of the *fi. fa.*, had not acted in good faith with

Connell vs. Culpepper & Boon.

the money which he controlled for the defendants, and that he had consequently discharged from the lien of his *fi. fa.* property in the hands of third persons. The instrument offered and read in evidence was an assignment; and if they believed that creditors were preferred by it, then it was void under the Act of 1818. And if Connell held said property under a void assignment, and has paid out and discharged younger *fi. fas.*, he has thereby discharged the lien of this older *fi. fa.*, which he owns, on property in the hands of *bona fide* purchasers for a valuable consideration without notice, and that a defendant remaining in possession of his property after sale was a badge of fraud, and, unexplained, became conclusive.

2. Because the Court erred in charging the Jury, as requested by plaintiff's counsel, that if they believed from the evidence, that John and Charles Rodahan were partners in building the Court House in Carrollton, and that they, or either of them, made a *bona fide* assignment of \$5,050 00 owing them for said building, for the payment of certain creditors, free from any trust or benefit to themselves, then said assignment is good, but added, "but if creditors were preferred by the assignment, then it was not good, but void."

3. Because the Court erred in qualifying the charge requested by plaintiff's counsel, that if plaintiff received the funds under the assignment to pay certain creditors, and did, in pursuance of said agreement, pay said creditors, his judgment lien was not thereby extinguished as to other property of the Rodahans, and if claimants bought property subject to this execution, they were in no better situation than Charles Rodahan would be, and their remedy is on their warranty against Rodahan, which charge the Court gave, but added, that was so if the assignment was made in good faith, and creditors were not preferred; but if creditors were preferred, then it was void; and if Connell had funds in hand under the assignment, and paid them out to younger *fi. fas.*, that the lien of his *fi. fa.* was extinguished as to property in the hands of third persons.

4. Because the Court erred in admitting the testimony of Goodwyn Driver, plaintiff's counsel objecting thereto on the ground of irrelevancy.

5. Because the Court erred in admitting the testimony of Driver as to John Rodahan having a large roll of money.

6. Because the Court erred in permitting claimants to prove an assignment by the record of the Inferior Court of said county—plaintiff objecting thereto on the ground of irrelevancy.

7. Because the Court erred in admitting in evidence the Tax Books.

8. Because the Court erred in admitting the testimony of W. J. Head and J. M. Redwine in relation to the Haralson county bonds.

9. Because the Court erred in rejecting the answers of Allen W. Turner.

10. Because said Court was illegally held, there being no Law authorizing said Court to be held on the 2nd Monday in October, 1859.

11. Because the Court erred in not permitting the plaintiff to prove by John W. Benson, that he could not have paid more for the property, levied on by the Sheriff under the Driver *fi. fa.*, than the amount of said *fi. fas.*, and that he did not communicate to any one the agreement between Connell, Driver, and himself.

12. Because the Court erred in charging the Jury, that if they believed that Connell paid the funds received from said assignment, to younger *fi. fas.* and not to older ones, that his judgment lien was thereby extinguished—there being no evidence upon which to predicate such charge.

13. Because the verdict was contrary to Law, the evidence, and charge of the Court.

The Court overruled the motion for a new trial, and counsel for plaintiff excepted, and assigns said refusal as error.

BURKE and BLACK, for plaintiff in error.

THOMAS CHANDLER, and BUCHANAN and WRIGHT, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Had the Jury found for Connell in this case, we should have felt constrained to have awarded a new trial. A clearer case of combination and confederacy than that established by the proof, between Connell and the Rodahans—Charles and John—we have seldom seen.

The proceedings under the Driver executions, alone, if

Worthan vs. Brewster.

there was nothing else, would constitute an effectual bar to prevent G. T. Connell from subjecting the property bought by Culpeper and Boon, to the payment of his *fi. fa.* We cheerfully and cordially affirm the Judgment of the Circuit Judge.

WORTHAN vs. BREWSTER.

1. Whenever the holder of a promissory note, signed by a principal and surety, extends the time of payment to the principal, without the concurrence of the surety, for the purpose of avoiding a defence to the note which is claimed by the principal, the surety is discharged from all liability on the note.
2. A new trial will not be granted on the ground that the verdict is contrary to evidence whenever there is sufficient evidence to support the verdict.
3. Upon an issue whether the surety had been discharged from liability on a promissory note by the *act* of the holder, the Jury returned the following verdict: "We, the Jury, find for the plaintiff sixty dollars with interest and costs of suit—releasing the security." *Held*, that the verdict was not void for uncertainty or irregularity.

Debt, in Coweta Superior Court. Tried before Judge HAMMOND, at September Term, 1859.

This was an action by Worthan against Hugh Brewster, security on a promissory note, of which the following is a copy, viz:

"\$60 00. Two weeks after date we, or either of us promise to pay McRunnells, or bearer, Sixty Dollars for value received. December 23, 1853.

(Signed,)

WM. ^{his} ~~X~~ BESHEARS.
^{mark}
 HUGH BREWSTER.

Test: W. B. WILKINSON.

Wortham vs. Brewster.

Plaintiff read in evidence the note and closed.

Defendant swore Fayette Smith, who testified in substance, that in 1853, or 1854, he was in company with Beshears and another person, coming to Newnan, when they were met by two men riding; that one of them was McRunnells, or he answered to that name, who said he was going to see Beshears to collect some money. Beshears said that the mule he sold him was unsound, and tendered him back. McRunnells said he sold the mule as sound, and refused to take him back. Beshears said he had given him a note with Brewster as security, and had stored his cotton with him to save him against loss. McRunnells told Beshears to keep the mule and he would wait with him till the next Christmas. In the opinion of witness, the mule was unsound.

Plaintiff in reply, read the answers of Elijah Nelson to interrogatories, who deposed that he was along with McRunnells when he sold the mule to Beshears for sixty dollars, and took his note, with Brewster as security. That as they returned home, some two or four weeks afterwards, about two miles from Newnan, they met Beshears with some other persons unknown to witness. Beshears said he liked his mule first rate, and that he had been offered eighty dollars for him, but would not take it, and told McRunnells that he wanted him to wait till he sold his cotton and he would pay him.

The Jury found for the defendant, and plaintiff's counsel moved for a new trial on the following grounds:

1. Because the verdict was contrary to Law and the evidence.
2. Because the Court erred in charging the Jury, that if McRunnells, to avoid a suit in consequence of the unsoundness of the mule, agreed to grant indulgence to the principal in the note, and extend the time of payment without the knowledge or consent of the security, then the security was discharged.

The Court refused to grant a new trial, and plaintiff excepts and assigns said refusal as error.

BUCHANAN and WRIGHT, for plaintiff in error.

M. KENDRICK, *Contra*.

By the Court.—LYON, J., delivering the opinion.

1. Was the charge of the Court right? It is a well settled principle, that if the creditor, by agreement with the principal without the concurrence of the surety, varies the terms of the contract, as by enlarging the time, &c., or if he does *any act* by which the risk of the surety is increased, then the surety is discharged. *Curan vs. Colbert*, 3 *Kelly* 248; *Brown vs. Riggins*, *ib.* 412; *Bethune vs. Dozier*, 10 *Geo.* 235; *Taylor vs. Johnson*, 17 to 521. The proof submitted by the defendant, was that the note sued on was given for a mule; that in consequence of the unsoundness of the mule, Beshears, the principal, refused to pay the note, and tendered back the mule to McRunnells, the vendor of the mule and payee of the note. McRunnells admitted that he sold the mule as a sound one, and told Beshears if he would keep the mule that he would wait with him until the next Christmas for the money agreed to be paid, to which Beshears agreed. The note was then due, and suit was not brought on it until some two years and a half thereafter. The Court charged the Jury that if these facts were true, the defendant was not liable—and we think the charge was right. For here was a new contract upon sufficient consideration by which the time of payment was extended from the first of the year 1854 to the latter part of that year, and to which the surety was no party, and by reason of which new agreement, the risk of the surety was greatly increased. Had no such agreement been made, it is not only possible, but very probable that the mule would have been returned and the trade rescinded, or the money would have been paid. At all events, the surety had a right to have the contract stand and be enforced as he made it; but as it was changed without his concurrence he was discharged.

2. Was the verdict contrary to the evidence? It is not denied but that there was sufficient evidence, although conflicting, of the agreement between McRunnells and Beshears, to which reference has already been made, to support the verdict in that respect; but it is claimed that there was no evidence, but that the plaintiff was an innocent and *bona fide* purchaser of the note without notice. On this point the evidence is not so satisfactory. One of the witnesses says that he and Beshears, on going towards Newnan, he thinks in April of 1853 or 1854, met McRunnells and another, when McRunnells said he was going to see Beshears to collect some

money; Beshears said the mule McRunnells had sold him was unsound, and tendered the mule back, &c. Now, altho' the note was not exhibited, it is not reasonable to suppose that McRunnells would call on Beshears for payment of the note without the note, or before it was due. Another witness, one Nelson, introduced by the plaintiff to rebut the testimony of defendant, testifies that he was present when the mule was sold and the note given, and that, subsequently, as he and McRunnells returned home, they met Beshears and others about two miles from Newnan, when Beshears, after expressing his satisfaction with the trade, told McRunnells that he wanted him to wait for his money until the next fall, and when he sold his cotton he would pay the note with interest. This was from two to four weeks after the note was given, and was evidently the same interview of which the other witness testified. While the evidence is not very clear, still we think the Jury was justifiable in inferring from all the facts, that McRunnells was at that time the holder of the note, and that it was then due and payable. If he was not the holder at this time, it was easy to have established the fact by Nelson, who seems to have been his companion all the time; but the plaintiff did not rely on the fact that he was an innocent holder of the note, he trusted to overcome the defence by the testimony of Nelson, and in this he failed.

3. Counsel for plaintiff in error insists that the verdict of the Jury, which is in the following words: "We, the Jury, find for the plaintiff sixty dollars with interest and cost, releasing the security," is illegal and void for uncertainty and irregularity. We do not think so. The question in issue was whether the surety had been discharged from liability on this note on the agreement between McRunnells and Beshears, and in the opinion of this Court the verdict of the Jury is so explicit in this respect, that it is impossible to mistake their meaning, and whatever else is in the verdict is mere surplusage and amounts to nothing.

Judgment affirmed.

May vs. Dorsett.

MAY vs. DORSETT.

1. A new trial will be granted when the verdict is contrary to the evidence.
2. When the defendant pleads and proves a negotiable promissory note of the plaintiff's as a set-off, the legal presumption is, that the defendant was the legal owner of such note at the commencement of the suit; and to avoid such set-off, it is necessary for the plaintiff to show affirmatively that he was not, in fact, the legal holder at that time. It is not sufficient to show that the defendant had previously transferred such note to third persons.
3. One who is a bank-officer, engaged in banking, and a judge of counterfeit money, is competent to give his opinion as to the spuriousness of a bank bill, especially when he gives the facts on which such opinion is founded.

Assumpsit, in Campbell Superior Court. Tried before Judge HAMMOND, at September Term, 1859.

This was an action of Assumpsit, brought by Dorsett against May, to recover the sum of one hundred dollars, alleged to be due and owing by defendant to plaintiff, by reason of a counterfeit bank bill paid by defendant to plaintiff, for value, and received by him as a genuine bill, at and for the amount of one hundred dollars, but which bill was counterfeit, and wholly worthless and of no value.

Defendant pleaded the general issue and a set-off to the amount of \$218.94, due by plaintiff to defendant on several promissory notes.

Upon the trial, plaintiff proved by W. E. Smith: That in the year 1855, he was agent for plaintiff; took certain notes of plaintiff's and shaved them off to defendant, receiving from him \$300; after he got the money, defendant remarked that he believed it was all Georgia Railroad money; witness then turned the ends of the bills, and on an inspection of about half of each bill, replied that they were all on the Georgia Railroad Bank; he thought they were all on that Bank, but could not be positive; there were two one hundred dollar bills, the balance in small bills; after he received the money, he went immediately to Dorsett, without putting it in his pocket, and let him have it; Dorsett wanted it for Mr. Foster, and he let him have it as soon as witness carried it to him; don't recollect whether Thomas J. Foster, Jr., was present or not.

Thomas J. Foster testified : That he saw Smith let Andrew Foster have some \$300 ; that there were two one hundred dollar bills and some small bills ; one of the hundred dollar bills was on the Georgia Railroad Bank, and the other on the same Bank ; that the bill sued on was one ; thought it was one, but did not know ; it was a bill for the same amount, with one corner torn off like the one in Court, and the same Bank ; did not notice the money very particularly ; was accidentally present.

Alfred Austell testified : That he was a bank-officer ; that Andrew Foster sent some money, some years ago, by him to Charleston, to pay a debt he owed there ; amongst the bills sent, was a one hundred dollar bill that was counterfeit ; could not say whether the bill in Court was the one or not ; in his opinion the bill in Court was a counterfeit.

To the testimony of this witness, as to the spuriousness of the bill, defendant objected, on the ground that there was higher evidence of that fact.

The Court overruled the objection, and defendant excepted.

Plaintiff then read the bill in evidence, and closed.

Defendant then, in support of his plea of set-off, read in evidence ten promissory notes on plaintiff and one James Lasseter, all dated and due in 1855, payable to W. E. Smith, except one, which was payable to defendant, amounting to \$119.44 ; and that the notes payable to Smith were transferred to defendant before this suit was commenced.

The Jury, under this evidence found for the plaintiff one hundred dollars with interest. Whereupon, defendant moved for a new trial on the grounds :

1st. Because the verdict was contrary to Law and the evidence.

2d. Because the Court erred in admitting the testimony of Austell.

3d. Because the Jury found contrary to the charge of the Court, and to the defendant's set-off.

The Court overruled the motion for a new trial, and defendant excepted, and assigned said refusal as error.

TIDWELL and WOOTEN, for the plaintiff in error.

FITCH, *contra*.

May vs. Dorsett.

By the Court.—LYON, J., delivering the opinion.

1. The defendant in the Court below, James E. May, having plead and put in proof the notes of the plaintiff, James R. Dorsett, was entitled to have the same allowed by the Jury as a set-off, and as the Jury failed so to find, their verdict was contrary to evidence, and the Court erred in refusing to grant a new trial on this ground.

2. It is true, that there was proof that the defendant had, after trading for these notes on the plaintiff, transferred them to third persons, but this does not establish the fact, or even raise a presumption, that he was not the legal holder at the commencement of the suit, for both facts may be true, and probably were. The notes were negotiable, and the defendant having properly pleaded them as a set-off, the legal presumption was, that he was the holder at the commencement of the suit. The onus was on the plaintiff to show affirmatively that the defendant was not so in fact, and so the Court substantially charged the Jury. The verdict was contrary to this charge, and the defendant was entitled to a new trial on this ground.

3. A new trial was moved for on another ground, that is: that the Court erred in admitting the testimony of the witness Austell, as to the spuriousness of the bank bill, which was the foundation of the plaintiff's action. This ground was not pressed in the argument before us. Nor do we see any good objection to the evidence. The witness was a bank officer, engaged in the banking business, and considered himself a good judge of counterfeit money. The witness not only gave his opinion, but the facts upon which this opinion was based. The objection to the evidence was on the ground that "there was higher and better evidence." What that higher and better evidence of the fact was, does not appear.

Whether there was sufficient evidence before the Jury, that the defendant May did, in fact, pass and pay the bill in controversy to the plaintiff, to authorize them to so find, was much discussed before us. And although we do not put our decision on that ground, it is, nevertheless, due to the parties, and to the Court below, for us to state frankly, that in our opinion, it is not. The evidence of W. E. Smith, who received the money from the defendant for the plaintiff, and amongst which this bill must have been, if it was ever

passed and paid by the defendant to the plaintiff, says, at the time, in 1855, when he received the three hundred dollars from the defendant for plaintiff, the defendant remarked that he believed it was all Georgia Railroad money. This called the attention of the witness immediately to the fact, of what kind of money was paid him, having the money then in his hand, and he turned down the ends of the bills, exposing about one-half of each bill, and looked through them, and he, the witness, remarked they were all on the Georgia Railroad Bank. He thought they were all on that Bank. The bill in controversy purported to be a bill on the bank of Cheraw, S. C., for \$100. Here was positive and direct evidence that the defendant passed no such bill to the plaintiff at that time; yet, it must have been at that time or not at all. It is not possible to see how the witness could be mistaken. To overcome the force and effect of this evidence, and also to establish a right to recover, the plaintiff introduces but one other witness, one Thomas J. Foster, who testifies, that he was present, not when defendant delivered the bills to Smith for the plaintiff, and when this particular examination was had as to the kind of money, but when Smith delivered the money to the plaintiff; that there were two \$100 bills, one on the Georgia Railroad Bank, and the other on the same Bank with the one sued on. He did not know, but thought the bill sued on was one of the bills; it was a bill for the same amount, with one corner torn off, and on the same bank; could not say that the bill sued on was the same, but that it resembled it very much in appearance, and he thought it to be the same bill; witness was not doing business for plaintiff nor Mr. Foster; was accidentally present; *did not notice the money very particularly*. This evidence is pretty clear, and if true, the bill in controversy must have been one of the bills that the witness, Smith, paid over to the plaintiff. But how is it possible for a witness who happened to be present when a sum of money was passed from the hands of one man to another, to remember, describe, and absolutely identify, the specific bills, after the lapse of four years and half—for this is the time that intervened between the periods of passing the bill and the giving in of his testimony—it is impossible to conceive! Add to this the fact that the witness had nothing whatever to do with the matter; had no connection with either of the par-

May vs. Dorsett.

ties ; did not particularly examine the bills ; his attention was not called to it in any way, either as to the character or kind of bills, so as to fix the particular bill or its characteristics in his mind ; and the statement becomes, to say the least of it, a most extraordinary one. What a marked contrast there is between the testimony of this witness and that of Mr. Austell. This gentleman was accustomed to deal in money ; he carried a \$100 bill from plaintiff to Charleston to pay a debt for him ; the bill was condemned as counterfeit ; his attention was thus called particularly to that bill ; he examined it, knew it to be counterfeit, yet he could not identify the bill in Court as the one that passed through his hands, though the witness Foster could, from an accidental glance of it as it passed through the hands of others, in a bundle of other bills, after a lapse of four years and a half ! It would be useless to follow this investigation further, for, as I have already stated, this view of the evidence is not conclusive, in our own minds. Our impressions are against the sufficiency of the evidence and for the reasons I have stated. The question is an open one for the parties to press further or not, as they may consider most advisable. The new trial is ordered because the verdict was contrary to Law and against the evidence, in the exclusion of the set-off pleaded and proven by defendant.

Judgment reversed.

BIGELOW vs. YOUNG.

1. Parol proof of the contents of a written contract, cannot go to the Jury without satisfactory preliminary proof to the Court, that the writing was executed and is lost.
2. When the question between parties is, What was the state of accounts between them at a particular time? it is error to admit evidence against objection, touching an item which was at that time barred by the Statute of Limitations.
3. It is within the discretionary power of the Court to allow a witness to be sworn, after the evidence on both sides has been announced closed, and the argument has been commenced; and a liberal practice in this respect is most favorable to the ends of justice.
4. But the practice of re-calling a witness to *re-state* a point in his testimony, after counsel have disputed about it in the argument in his hearing, while also under the control of a sound discretion in the Court, is one which ought to be allowed with great caution, and not at all where there is reasonable ground to suspect the *fairness* of the witness.
5. Trover is an action for damages done to the right of possession, and the amount of the damages depending therefore upon the extent of the right, it is competent for the defendant to reduce the damages by showing the quantity of the plaintiff's interest.
6. Where two parties make a written contract of pawning, one advancing money and the other pledging a negro, to be reclaimed *at any time by payment of what the pledger may owe the pledgee*, the negro can be redeemed only by the payment of all that may be due at the *time of the redemption*.

Trover, in Polk Superior Court. Tried before Judge HAMMOND, at October Term, 1859.

This was an action of Trover, brought by Rebecca Young against Benj. F. Bigelow, for the recovery of a negro man slave named Sam.

The parties having announced themselves ready, counsel for plaintiff called on counsel for defendant to respond to a notice to produce certain papers at the trial. Defendant, in response, produced these papers; one a receipt from the plaintiff and one Scott Young to defendant for \$246.37, dated 17th January, 1852. The second, a paper, of which the following is a copy:

"BENTON COUNTY, Jan. 17th, 1852.

Received of Rebecca Young, as executor of the estate

Bigelow vs. Young.

of Griffin Young, deceased, and Scott Young, a negro boy, by the name of Sam, about ten years old, to be held as my property, for value received—which boy may be redeemed of me by Rebecca Young at any time, by her paying the amount which may be due me; the use of the negro to pay for the interest of indebtedness to me.

[Signed.]

BENJ. F. BIGELOW.

REBECCA ^{her} ✕ YOUNG.JOHN S. YOUNG. ^{mark.}

Test: LOTT WHITLOCK.

And the third, the following receipt:

\$524.73.

Received of Benj. F. Bigelow five hundred and twenty-four $\frac{7}{8}$ dollars. March 25th, 1857.

[Signed]

REBECCA ^{her} ✕ YOUNG.JOHN S. YOUNG. ^{mark.}

Test: W. M. DAVIS.

Plaintiff proposed to prove the contents of a receipt, or contract in writing, not produced, and described in an affidavit made by Henry F. Vernon, as a foundation for the notice given. Counsel for defendant objected to this testimony on the ground, that the execution of the paper must be first proved, before proof of its contents could be made. The objection was overruled by the Court and the evidence admitted, and defendant excepted.

At the conclusion of plaintiff's evidence, counsel for defendant moved for a non-suit on the ground, that there was no evidence of conversion, and because the money alleged to have been tendered (the \$247.37 mentioned in the last receipt above set out) was not deposited in the Clerk's office.

The Court refused to grant the motion for non-suit, and defendant excepted.

Defendant then offered in evidence an exemplification of the last Will and Testament of Griffin Young, deceased, plaintiff's testator, the object of which was to show that plaintiff had only a life-estate in the negro sued for. The Court, upon objection, excluded this evidence, on the ground, that it was incompetent for defendant to prove such fact. To which ruling counsel for defendant excepted.

Defendant then proposed to prove by the depositions of a witness, taken by commission, that the boy Sam, the negro sued for, was received by plaintiff as a legatee, in and under the Will of said Griffin Young; and that, by said Will, she was entitled to only a life-estate in said negro, which testimony, upon objection, was also repelled by the Court, and counsel for defendant excepted.

After the testimony was closed, and after plaintiff's counsel had finished his opening argument, he moved to prove by the witness John S. Young, an indebtedness on the part of defendant to plaintiff. Defendant objected, on the ground, that it was too late, at that stage of the cause, to let in the proof, and that the witness was interested, and further, that the debt proposed to be proven was barred by the Statute of Limitations. The objection was overruled, and the testimony was received, and defendant excepted.

Counsel for plaintiff, while making his concluding argument to the Jury, proposed to recall the witness John S. Young, to state what he had testified to when on the stand, counsel stating in the hearing of the witness what he understood the witness had proved or testified to. Counsel for defendant objected. The objection was overruled, and the witness allowed to state what he had sworn on his first examination, and defendant excepted.

The Court, among other things, charged the Jury, that if defendant held the negro as a pledge or mortgage from plaintiff, to secure the payment of a debt, that then defendant had no right to retain the possession of the said boy, to secure the payment of subsequent advances made by him to plaintiff, or subsequent demands or indebtedness, unless it was so stipulated and expressed in the written mortgage or contract. That the doctrine of *tacking* did not exist at Law, unless by the contract of the parties—to which charge defendant excepted.

The Jury found for the plaintiff two thousand dollars, which might be discharged by the delivery of the negro within ten days, and three hundred dollars for hire.

The defendant moved for a new trial upon the ground of error in all the rulings and charges above stated and excepted to, and upon the further ground, that the verdict was contrary to Law and the evidence and the charge of the Court.

Bigelow vs. Young.

The presiding Judge refused to grant a new trial, and counsel for defendant excepted, and assigns said refusal as error.

VERDERY, HARVEY, BUCHANAN and WRIGHT, for plaintiff in error.

CHISOLM and WADDELL, represented by SHROPSHIRE, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. We think the Court erred in allowing *parol* evidence of the contents of the writing, about which Vernon and Hall testified, to go to the Jury. If we make the assumption on which Mrs. Young's whole case rests, that this paper is a different one from those produced in Court by Bigelow under notice, then there was not the slightest proof that the paper ever was executed. On the other hand, if the paper was *not* a different one, then it was not lost, but was in Court, and ought to have been allowed to speak for itself, to the exclusion of all *parol* evidence touching its contents. On either hypothesis, the *parol* proof of the contents was improperly admitted; for before that proof was allowed to go to the Jury, there ought to have been satisfactory preliminary proof to the Court that the paper had been executed and was lost. In point of fact, we think that the preliminary proof, so far from showing that the paper had been lost, shows that it was in Court. The written contract, about which Vernon and Hall testified, was no doubt the very same which Bigelow produced, consisting of the two contemporaneous papers, bearing date the 17th January, 1852. The execution of these two papers was proven by the subscribing witness to them, so clearly, that it was not even contested by Mrs. Young. Now, it is a curious, if not incredible, thing, that the parties should have executed a different and *inconsistent* writing, to be an exponent of the same contract. The very satisfactory conclusion to which our minds are brought by the whole preliminary proof is, that the parties did no such inconsistent things, and the written contract about which Vernon and Hall testified, was the same which Bigelow produced in Court. The variance between the con-

tents of the two papers of the 17th January, 1852, and the contents about which the witnesses testified, is a variance which does not so much prove the existence of a different paper, as it illustrates the importance of the general rule, that the writing must speak for itself.

2. We think there was error in admitting the evidence touching the negro hire, for the evidence showed that more than four years had elapsed after the negro hire was due, and before the tender was made for the redemption of the pledged negro, and so that item in Mrs. Young's account was barred by the Statute of Limitations.

3. We do not think there was error in allowing the witness to be sworn after the evidence had been announced as closed on both sides, and there had been some progress made in the argument. The ends of justice are much better promoted by liberality than stringency in matters of practice, and we see no reason for pronouncing that the Judge abused his discretionary powers in this case.

4. Another assignment of error is made upon the Judge's having allowed a witness to be recalled and to *restate* a point in his testimony about which counsel differed in their recollection. This is a dangerous practice, and, we think, should be allowed, if at all, with much caution. For myself, I have no hesitation in saying, that it ought never to be allowed with a witness whose fairness lies under any ground of suspicion. An unfair witness will be sure to make his second statement more favorable than his first one was, to that side he leans towards, after the dispute in his presence has shown him how he can mend it. With these remarks on the general rule in such cases, we pass from the point without deciding whether there was error in regard to it in this case or not, for such a decision could settle no principle, and the same question cannot recur on the next trial in the same light in which it is now presented.

5. We think there was error in rejecting the evidence to show that Mr. Young had only a life-estate in the negro. Trover is an action for *damages* done to the right of possession, and the amount of the damage obviously depends upon the *extent* of the right. It needs no argument to prove that one suffers less damage in losing only a life-estate than in losing the fee simple. We think, therefore, the evidence ought to have been admitted in reduction of damages. But

Bigelow vs. Young.

it was said in the argument, that the negro was pledged by Mrs. Young, as executrix of Griffin Young, deceased, to whose estate the negro belonged, and that she had the right, therefore, to recover the full value of the negro, without regard to the limited nature of her personal interest in him, in order that she might account to the remainder-men for their interest in him. The answer to this is, that she had no right to pledge the negro, and that the very act of pledging at all constituted an *assent to the legacy*, and from that time the life-estate was hers, and the remainder was complete in the remainder-men. She, therefore, was entitled to recover only her own interest in the negro, while the remainder-men had to look after their own.

6. We think the charge given in this case was erroneous. Whatever may have been the written contract of the parties, they certainly had the power to vary it by subsequent agreement, written or verbal. The charge was given in reference to evidence which we hold to have been improperly admitted and which will not be received on the next trial. We shall, therefore, only say that we think the proper charge in the case would be founded solely upon the contract as evidenced by the papers which Bigelow produced, and that under these Mrs. Young is entitled to have the negro returned to her when she pays Bigelow all that she may owe him at the time when the redemption takes place, but not till then.

7. These principles, applied to the evidence in this case, lead necessarily to the conclusion that the non-suit ought to have been awarded as asked. The evidence shows that Mrs. Young owed Bigelow more than seven hundred dollars when she demanded the negro, and that she tendered him only \$246.37. She had no right to reclaim the negro without tendering all she owed.

Judgment reversed.

Slayton vs. Russell.

which question could not be determined by the Justices. The objection was overruled, and the *rule nisi* admitted and read in evidence. Russell then proved that said rule was made out in the forenoon, of the 17th Sept., 1858, and served on Slayton's counsel about 6 o'clock, P. M., of the same day. Said rule contained an order restraining the Sheriff and all others from executing the writ of *habere facias possessionem* until the further order of the Court.

It further appeared on the trial, that the Deputy Sheriff put Slayton into possession of the premises about dark on the 17th September; that he had no notice of the *rule nisi*. Russell further offered in evidence an affidavit of illegality to said writ, to the reading of which Slayton objected, on the ground, that the facts therein stated involved the validity of the judgments both of the Superior and Supreme Courts, and said Justices had no jurisdiction of this question. The objection was overruled, and the affidavit allowed to be read in evidence. Russell further proved, that said affidavit was handed to one of the Deputy Sheriffs, who had the writ of possession in his hands, on the evening of the 16th September, and that he offered to said Deputy, at the time, a mule or any other property that he would take to levy on; that no levy was made, and the writ was withdrawn from the hands of the deputy by the agent of Slayton.

Upon this evidence the Justices determined that the right of possession was in Russell, and gave judgment accordingly. To all of which rulings, decisions and judgment Slayton excepted, and alleged the same to be error, and sued out certiorari to correct and recover the same.

On the hearing before the presiding Judge of the Superior Court, he ordered the certiorari to be dismissed, and that the judgment of the Justices be executed—to which the counsel for Slayton excepted.

HUIE and CONNER, for the plaintiff in error.

TIDWELL and WOOTEN, *contra*.

By the Court.—LYON, J., delivering the opinion.

The right of the plaintiff in error to the possession of the corn in controversy depended entirely on the vitality of the

writ of *habere facias possessionem*, under which the Deputy Sheriff, William A. Crumby, acted in putting him in possession thereof. That writ had been superceded and suspended by an order of the Superior Court of Fayette County before the Deputy Sheriff had placed the plaintiff in error in the possession. The writ was, therefore, inoperative, and the possession acquired under it wrongful and tortious, whether the plaintiff in error had notice of the order not. But there is abundant evidence in the record, that if Slayton himself did not have notice of the order, his agent and attorney did, and by which he is bound. The tenant, Russell, who made the corn, and who had thus been deprived of his property, had the right to rescue the possession of which he had been illegally ousted. The judgments of the Courts below, in so holding, must be affirmed.

LOW vs. ARGROVE AND WIFE et al.

1. When a promissory note, without any consideration expressed in it, is changed by the holder by stating a certain tract of land as the consideration. the alteration is a material one, and vitiates the whole note.
2. The fact of the execution of a note has nothing peculiar about it to save it from the operation of the general rule in Equity, that the answer, when responsive to the bill, can be overcome only by two witnesses, or one witness aided by corroborating circumstances.

In Equity, in Meriwether Superior Court. Tried before Judge BULL, at August Term, 1859.

This was a bill in Equity by John Low against Allen Argrove and Mary Argrove, his wife, and Joel Hood and Mary A. Hood, his wife. The bill, in substance, alleges that complainant, about the 1st December, 1853, purchased of Mary

Low vs. Argrove and Wife et al.

Burton a certain tract of land in the 10th district of Meriwether County, for the sum of \$1,200; that immediately after said purchase, and before titles for said land had been executed by Mary Burton to complainant, he, at the request and solicitation of said Mrs. Argrove and Mrs. Hood, both *femme coverts*, sold said land to Mrs. Argrove, for the sum of \$1,500; that Mrs. Hood, who had a large separate estate, joined with Mrs. Argrove in a note to complainant for the said purchase money, which note is as follows:

"On or by the 25th December, 1855, we or either of us promise to pay John Low, or bearer, the sum of fifteen hundred dollars, with interest from the 25th December, 1854, without defalcation, *for tract of land in 10th District.*

[Signed]

"MRS. MARY ^{her} ~~X~~ ARGROVE,
mark.

"MRS. MARY ^{her} ~~X~~ HOOD.
mark.

Witness: JOEL HOOD.

That Mrs. Burton, at complainant's direction and request, therefore executed titles for said land to Mrs. Argrove. The bill alleges that the parties now refuse to pay said note. That the land has been sold to one Matthews, to defeat complainant in the recovery of his demand, and that Argrove and wife have no property unencumbered, or, at least, not enough to satisfy complainant's claim; that Mrs. Hood has a large separate estate under an ante-nuptial settlement which she manages and controls, and which she holds free from the debts, contracts or control of her husband. The bill prays that said land be sold, and that the proceeds of the sale be applied to complainant's note, aforesaid, to the exclusion of all other liens, or that said note be paid out of any property belonging to said Argrove and wife, or said Hood and wife.

The defendants answered the bill, amongst other things denying that said land was purchased by Mrs. Argrove from complainant, or that she, or any, or either of them, had anything to do with him, in the purchase of the land; that it was bought from Mrs. Burton, and the money paid to her; that the note mentioned in the bill, signed by Mrs. Argrove and Mrs. Hood, was given for borrowed money; that they never signed the note set out in the bill, and made an exhib-

it thereto; that the note they signed had not the words, "*for tract of land in 10th District*," but these words have been added by complainant since they signed said note.

The case was heard upon the bill and answers and the proofs. Complainant introduced in evidence the note set out and described in the bill; the marriage contract between Hood and wife, and proved that Mrs. Hood was in the habit of carrying on and transacting business as a *feme sole*; also proved the insolvency of Argrove and wife.

The material, probably controlling, question made in the Court below was, whether the note set out in the bill as the foundation of complainant's action was made by defendants, Mrs. Argrove and Mrs. Hood; and, if so, whether the words, "*for tract of land in 10th District*" were in the note when signed, or were afterwards added by the complainant; and if the latter, what was the effect of such addition or alteration?

Upon this point the Court charged the Jury, that these words, if put in the note after its execution and delivery, amounted to a material alteration, although the note may have been given for the land, and that such alteration vitiated the note, and that it could not be collected in Law or Equity.

The Court further charged the Jury, that Mrs. Argrove and Mrs. Hood, having in their answers denied making such a note, it was incumbent on complainant, in order to entitle him to a recovery, to contradict and overcome said answers, by at least one witness and corroborating circumstances.

To which charge complainant excepts.

The Jury found for the defendants. Whereupon, counsel for complainant tenders his bill of exceptions, assigning as error the aforesaid charge.

GEO. A. HALL, for the plaintiff in error.

ADAMS and KNIGHT, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. Where a promissory note does not state that it is given for any consideration, not even for value received, is an addition to it, stating truly that it is given for a certain tract

Low vs. Argrove and Wife et al.

of land, a material alteration? The addition is a material alteration just as certainly as the note is a material paper. Waiving the question as to the validity of the note, without the statement of any consideration, its effect was changed by stating that its consideration was a tract of *land*. The fact is a material fact, for it gives the vendor a lien on the land for the payment of the debt, and the statement of the fact in the note is a material statement, for it furnishes *evidence* of a material fact. Now, the whole force and effect of the note itself is only as *evidence*. It is not the debt, but only the appointed evidence of the debt. If the holder of the note, without the consent of the maker, adds anything which is material to the evidence thus appointed, he makes evidence for himself just as effectually as if he were to forge the whole note. Whether the forged addition states the truth, is just as important as whether a forged note states the truth. If one man should forge a due-bill on another, acknowledging a debt of a hundred dollars, he would not be saved from the crime of forgery, nor save the paper from total condemnation in a Court of Justice, by showing that the money really was due according to the statement in the forged paper. So, the truth of any statement added to the note cannot save the addition from being material, nor save the whole paper from the fate of a forged paper. When the holder of a paper tampers with it by putting a material addition to it, he vitiates the whole paper. We do not say that he cancels the debt which is evidenced by the note, but we do say that he must recover it on other evidence than that which was appointed by the parties, but which has been put in disrepute by his own act. The *note* is cancelled. We do not think there was any error in the charge on this point.

2. Nor do we think that there was any error in the charge, that on the point of the execution of this note, the answer of the makers could not be overcome except by two witnesses, or one witness aided by corroborating circumstances. Such is certainly the general rule in Equity, in relation to the effect of an answer which is responsive, and we see nothing to vary the rule in this case. The answer on the point is directly responsive to the bill.

• Judgment affirmed.

GLASS & BLALOCK vs. COOK.

Where the charge of the Court is calculated to prevent the Jury from giving to any portion of the testimony proper consideration, and the party may thereby have been injured, a new trial will be granted.

Debt, in Fayette Superior Court. Tried before Judge BULL, at September Term, 1859.

This was an action of Debt, brought by William N. Cook, executor of Hubard Cook, deceased, against William Glass, and Jesse L. Blalock, upon a promissory note for seven hundred and twenty-five dollars, payable to plaintiff, executor aforesaid, and dated 3d Nov., 1857, and due twelve months after date.

The defendants pleaded that said note was given for a negro boy about 10 years old, bought by them at the sale of the negroes belonging to the estate of Hubard Cook, dec'd, made by plaintiff as his executor, and that plaintiff warranted said negro to be sound, when, in fact, said negro was unsound, and of no value, and died shortly after said purchase; that said plaintiff made said warranty, knowing at the time that the negro was unsound, and that his representations as to the boy's soundness and condition were false and untrue.

Amongst other testimony, defendant offered and read in evidence the bill of sale executed to them by plaintiff, which was as follows, viz :

GEORGIA, FAYETTE COUNTY :

Received of J. L. Blalock and William Glass, seven hundred and twenty-five dollars, in full payment for a negro boy by the name of Lawrence, about 9 years old, of dark complexion, which negro I warrant to be sound in body and mind. Nov. 3d, 1857.

[Signed]

WM. N. COOK, Ex'or
of Hubard Cook, dec'd. [L. s.]

DAVID D. MINN,
L. S. W. MINN, Clerk S. C.

Both parties having submitted their testimony, the presiding Judge charged the Jury, who returned a verdict for the plaintiff, for the full amount of the note and cost; whereup-

Glass & Blalock vs. Cook.

on, counsel for defendants moved for a new trial upon the following grounds:

1st, 2d and 3d. Because the verdict was contrary to Law and the evidence, and against the weight of evidence.

4th. Because the Court erred in charging the Jury, that the bill of sale was executed by plaintiff *as executor*, and did not bind him personally, and, in the opinion of the Court, the executor did not intend thereby to bind himself personally.

5th. Because the Court erred in charging the Jury, that although the executor stated publicly at the time of the sale, that the negro was sound and healthy, and "*the best negro of the flock*," yet he was not liable unless it was proven that the negro was unsound at the time of sale, and that the executor knew it.

6th. Because the Court erred in ruling out that part of the answer of James Oliver, in which he deposed that he heard plaintiff say, during the sale, that if the property was not good, we are—alluding, as witness supposed, to the title and soundness of the negroes.

7th. Because of newly discovered evidence: the defendant, Blalock, swearing that since the trial, he had discovered that he could prove by several witnesses, (naming them) that plaintiff knew at the time and before the sale of said negro, that he was sickly and valueless, and that he had no knowledge of said evidence at the time of the trial, &c.

The presiding Judge overruled the motion for a new trial, holding, after consideration, that there was no error in the rulings and charge of the Court; that there was sufficient evidence to support the verdict, and that the newly discovered evidence was merely cumulative.

To which refusal counsel for defendants excepted, and assign said refusal as error.

J. M. and W. L. CALHOUN, for the plaintiffs in error.

TIDWELL and WOOTEN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We concur with the Court, that the bill of sale made by Cook, the executor, creates no personal liability upon him,

Speer vs. The Atlanta and West Point Railroad.

and that the only ground of defense to the note given for the boy Lawrence is, the fraudulent representation as to his soundness. The proof was conclusive as to the diseased condition of the negro, at the time of the sale and previously, and the discrepancies were pretty strong to bring home a knowledge of the fact to Cook; and hence, we think the presiding Judge used too strong language in charging the Jury: "That although the executor (Cook) stated at the sale publicly, that the negro was sound and healthy, and the best negro of the flock, yet he was not liable, unless it was *positively* proven that the negro was unsound at the time of the sale, and the executor knew it."

Now, the unsoundness of the negro, and the knowledge of the executor, may be established by circumstances as well as by direct and positive proof. Both these points were pretty satisfactorily made out—the latter mainly on circumstantial evidence; and yet, the Jury, under the instructions of the Court, might have disregarded the testimony entirely, not being *positive*. And for this cause, we feel constrained to award a new trial, and, I will add, not reluctantly, upon the facts in the record.

It is unnecessary to make any remarks upon the newly discovered evidence, as that can be procured for the next trial.

SPEER vs. ATLANTA AND WEST POINT RAILROAD.

Suits brought against a Railroad Company for a breach of contract, prior to 1859, had to be instituted in the county where the office for the transaction of the business of the corporation was kept.

Case, in Troup Superior Court. Decision by Judge CARRISS, at May Term, 1859.

Speer vs. The Atlanta and West Point Railroad.

This was an action by William A. Speer against the Atlanta and West Point Railroad Company, to recover damages for breach of contract; said damages alleged to have been sustained by reason of the failure and refusal of defendant to perform a certain agreement made with plaintiff relative to certain privileges and favors to be granted and allowed him, in consideration of his conveyance to defendant of the right of way for said Road through plaintiff's land.

Defendant pleaded to the jurisdiction of the Court, on the ground, that its principal office or place of business was not in the county of Troup, but in the county of Fulton, and was liable to be sued and impleaded in Fulton County, and not elsewhere. And further, that the President and chief officer of the Atlanta and West Point Railroad Company did not, nor does not, reside in the county of Troup, but in the county of Richmond.

Plaintiff demurred to said plea, which demurrer was overruled by the Court and the plea sustained, and the action dismissed—to which decision counsel for the plaintiff excepted.

SPEER & SPEER, for the plaintiff in error.

BLECKLEY, *contra*.

By the Court.—**LUMPKIN, J.**, delivering the opinion.

This is a suit brought by the plaintiff in error against the Atlanta and West Point Railroad Company for the breach of a contract. The action was instituted in Troup County, through which the Road runs. Atlanta, in Fulton County, is the place of business of the corporation. There was a plea filed to the jurisdiction of the Court, and a demurrer put in to the plea, which was overruled by the Court; that is, the Court held that Fulton County, and not Troup, was the proper place for bringing the suit.

The action is brought under the Act of 1856, and not the Act of 1854. It is by Common Law process as prescribed by the Act of 1856, and not by notice, as required by the Act of 1854. Now, the Act of 1856 does not extend to suits brought for violation of contracts, but only for certain

injuries therein specified. Indeed, it is somewhat doubtful whether the Act of 1854 gives the right to sue upon contracts, notwithstanding the generality of its terms. If it does, the body of the Act is lucider than its title; for the title does not extend to such cases.

Perhaps under the head Statutes of the last Legislature, the case might be reversed in Troup County. This Act did not operate upon a decision already made.

MILNER vs. THE STATE OF GEORGIA.

1. A new trial will not be granted when the verdict is not contrary to law; contrary to the evidence, or strongly and decidedly against the weight of the evidence.
2. On the trial of one for an assault with the intent to murder, it is no error in the Court to refuse to charge the Jury that if they believed from the evidence that the prosecution was unfounded, that they should not only find the defendant not guilty, but that they should return the prosecution unfounded or malicious.
3. Neither is it error in refusing such request for the Court, in response thereto, to remark, "that there was no evidence to warrant the charge, when such is the fact."
4. A new trial will not be granted on the ground of newly disclosed evidence when there is no affidavit from prisoner or his counsel that such evidence was unknown to them during the trial, especially when the witness by whom this newly discovered evidence is expected to be proven was sworn and examined on the trial in the defense, and who remembers the additional facts by having his recollection subsequently refreshed.

Indictment for Assault with intent to Murder, in Fayette Superior Court. Tried before the Hon. D. F. HAMMOND, Judge, at September Term, 1859.

John H. Milner, the plaintiff in error, was indicted for an assault with intent to murder, and convicted. He moved for

Milner vs. The State of Georgia.

a new trial on the grounds—1st. That the verdict was contrary to law and the evidence. 2nd. That the Court refused to charge the Jury as requested by counsel for defendant, that if they believed from the evidence that the prosecution was unfounded, they should not only acquit defendant, but should return the prosecution unfounded and malicious—the Court refusing so to charge, and saying that there was no evidence to warrant such charge, thereby expressing an opinion on the facts of the case. 3d. That since the trial defendant had discovered new and material evidence not known to him before.

The Court refused the motion for a new trial, and counsel for defendant excepted, and assigned as error said refusal.

BLALOCK & JONES, TIDWELL & WOOTEN, for plaintiff in error.

Solicitor General T. L. COOPER, *contra*.

By the Court—LYON, J., delivering the opinion.

1. The three first grounds of the motion for new trial, to-wit: that the verdict was contrary to law; contrary to the evidence, and strongly and decidedly against the weight of the evidence, may all be considered together, as they all depend upon the single question, whether there is sufficient evidence to support the finding of the Jury? We think there was, and shall dispose of the whole by a very slight reference to the testimony itself. Beavers, the prosecutor, went into a grocery in Fayetteville on the night of the 29th day of March, 1859, and after remaining a short time he went out, leaving the prisoner inside of the grocery, standing at the counter. As prosecutor walked away from the grocery he heard some one walking and following him; a four pound iron weight, a weapon likely to produce death, was thrown at him with great force, passing beneath the rim of his hat close to the side of his face. On turning round he saw the prisoner run back into the grocery. The prisoner at that time was in custody under a peace warrant issued by the prosecutor as a magistrate, upon the application of the wife of prisoner, who had come to the house of prosecutor and remained there a while. Prisoner had bad feelings towards prosecutor; had

clenched and shook his fist that day, saying, he would like to get one crack at prosecutor; had threatened, previously, that if prosecutor ever crossed his path he would put a ball through him. Other testimony of a negative and conflicting character was offered, but was immaterial and incompetent. Under these circumstances it is not at all extraordinary that the Jury should find the prisoner guilty.

2. The fourth ground of the motion is, that the Court erred in refusing to charge the Jury as requested by counsel for prisoner, and in saying as he did so, "that there was no evidence to warrant the charge." Counsel did not rely greatly on the refusal to charge, for the good reason that the giving or refusing such charge could not go in aid of any defense of the prisoner; the finding of a malicious prosecution affects the prosecutor, and not the prisoner; all the prisoner is interested in, so far as the trial is concerned, is a verdict of acquittal. Hence the refusal of the Court to give such charge would never be a good ground for sending the case back.

3. The ground on which counsel mainly rests their argument on this point is, the remark that the Court made in refusing the request. What the Court stated was a proper response to the request. It was the truth. There was no evidence that the prosecution was unfounded or malicious; but on the contrary, evidence enough to sustain a verdict of guilty as we have held; counsel seem to think that the remark of the Court was an expression of opinion on the facts, which was calculated to exercise a controlling influence on the minds of the Jury; that it was in effect saying, that there was at least a probable cause made out by the testimony. If counsel did in fact think so, the request ought not to have been made so as to draw this fire from the Court. But the remark of the Court had no such meaning. It meant simply, that from all the facts before the Court, there was not sufficient evidence of a want of foundation for the prosecution, or of malice in the prosecutor, to justify the Jury in taxing the prosecutor with the costs of the prosecution.

4. The fifth ground for a new trial is, that of newly discovered evidence, which is contained in the affidavit of the witness, one William S. Brown, appended to and forming part of the record. There is no affidavit from the prisoner or his counsel that this evidence was unknown to them at the trial;

Burch vs. Ward.

besides this, the witness, by whom this newly discovered evidence is to be made, was a witness examined on the trial for the defense. The new and additional facts recited in the affidavit, which the witness says he remembers since his recollection has been refreshed, and "that he was in the grocery with the prisoner at the time and on the night testified to by prosecutor, and when the prosecutor came in, that the prosecutor took a drink, was half drunk, and that the prisoner remained talking with him some half hour after prosecutor went out." We know of no rule which would authorize a new trial to be ordered on the ground of such *newly discovered evidence* under these circumstances.

Judgment affirmed.

BURCH vs. WARD.

1. This case decides no legal principle, but only the bearing of facts in the particular case.

Certiorari, in Fayette Superior Court. Decision by Judge HAMMOND, at September Term, 1859.

Morton N. Burch sued out a certiorari to correct the verdict and judgment rendered in a Justice's Court in certain suits wherein he was plaintiff and Miles Ward was defendant. The suits were brought on dormant judgments, alleged to have been formerly obtained by Burch against Ward in said Justice's Court.

The following proceedings were had on the trial in the Justice's Court on the appeal: Plaintiff offered in evidence the original summons, and called for the docket upon which the judgments were entered, which could not be found or produced; plaintiff then proved by one Brassell, that he, Brassell

had once acted as a Justice of the Peace in that same district; that he was the successor of John McLain, the Justice before whom the judgments sued on were obtained. Witness had the old docket in his possession, and examined it in reference to these cases, and there were four or five judgments entered thereon, signed by McLain, J. P.; that in 1856 McLain sent to him for said docket, which he sent to him and had never seen it since.

Joseph McLain proved that he got said docket from Brasell, his successor in office, and that he let Oliver Pearson have it, and had never seen it since, and did not know where it was.

Mrs. Pearson, the widow of Oliver Pearson, testified that she had never seen said docket, either before or since her husband's death; she was familiar with his books and papers; was executrix and John Whitaker executor of her late husband; Whitaker had taken off some of the papers, but never a docket; had never made a search for said docket, but had never seen it, and believed that if it was in the house she would have seen it; there was a drawer in the house that she had never examined particularly.

Plaintiff then proved by N. Miller that he, witness, was one of the appraisers of Pearson's estate—examined his books and papers, but saw no docket, except the one Pearson had used while he was Justice.

Plaintiff having laid this foundation, offered in evidence one of the executions. Defendant objected, on the ground that there was no evidence that there ever had been a judgment. The objection was overruled and the execution admitted. Here plaintiff closed.

Defendant tendered in evidence two notes, one for \$40 and the other for \$28, signed by Jesse Ward as principal, and Miles Ward as security, payable to Oliver McLain, and dated in 1835. Plaintiff objected to the introduction of said notes. Defendant stated that his object was to show that Jesse Ward had an interest in the suits now being tried, and that they had all been settled by Miles Ward, he having paid off said two notes on which he was security for Jesse. Plaintiff admitted that Jesse Ward had an interest in the suits. Plaintiff further objected to the introduction of said notes, on the ground that they bore date prior to the rendition of the judgments sued on. The objections were overruled and the

Burch vs. Ward.

notes admitted and read to the Jury. Defendant then proved by one James Ward, that in 1838, Jesse Ward told him to tell Miles Ward, that if he would pay off the two notes, that it should be a full payment of all demands said Jesse held against said Miles. Did not know what demands Jesse held against Miles in 1838; did not know whether Jesse at that time had any interest in the cases now in Court; did not know whether the debt now sued on existed then or not. On being asked upon reexamination what debts Jesse Ward held against Miles in 1838, he answered, "Of course it was the Burch papers, and that it was these Burch papers that were to be settled."

Defendant further proved that Mr. Grice, the attorney for plaintiff, was employed by Andrew McBride and Jesse Ward, and that he, defendant, had been able for the last 15 years to pay all his debts.

Upon this testimony, the Jury found for the defendant, and plaintiff excepted, first, because the Justice Court erred in admitting in evidence said notes. Second, because the verdict was contrary to law and evidence, and applied for a certiorari, to recover and correct said finding and judgment.

The Judge of the Superior Court, the Hon. D. F. HAMMOND, upon hearing the case, ordered the certiorari to be dismissed. To which decision counsel for plaintiff excepts.

S. C. GRICE, & TIDWELL & WOOTEN for plaintiffs in error.

J. L. BLALOCK, *contra*.

By the Court.—JENKINS, J., delivering the opinion.

A view which shows the materiality of the notes introduced in evidence by the defendant, and which removes all the difficulties stated by the plaintiff, and reconciles the testimony of the witness Ward with the other facts in the case, is this: Jesse Ward being jointly interested with Burch in a debt which Burch held against Miles Ward, and which was unreduced to judgment, agreed with Miles that the debt should be considered as paid whenever Miles should take up these notes wherein Jesse was principal and Miles security. There was delay in taking up the notes, and the Burch debt remaining unpaid, went to judgment. After judgment

Jackson & Brothers vs. Mowry.

Miles took up the notes, and thereby paid the judgment under the agreement which had begun before judgment and continued after it. This view is consistent with all the evidence in the case, and we think the verdict in conformity with it ought not to be disturbed, and that the notes in support of it were properly admitted.

Judgment affirmed.

JACKSON & BROTHERS *vs.* MOWRY.

If A. owns land that is in the occupancy of B., the Law will imply a liability on the part of B. to pay rent for the land; but no such presumption can arise where B. expressly disclaims holding possession under A.

Action for Rent, &c., in Fulton Superior Court. Tried before Judge BULL, at October Term, 1859.

This was an action by S. and L. Mowry against Jackson & Brothers for the rent of a store house in the city of Atlanta, from 1st June, 1858, to 1st October, 1858. There was also a count for use and occupation.

Upon the trial, plaintiffs proved that J. T. Doane executed to them a mortgage of the premises 7th August, 1855; that said mortgage was afterwards foreclosed and sold by the Sheriff under and by virtue of the mortgage *fi. fa.*, on 1st Tuesday in June, 1858, when plaintiffs became the purchasers. They then proved that defendants were in possession of the premises at the time of the sale by the Sheriff, and had been in possession since 1st January, 1858, as tenants of John A. Doane, and that they remained in possession till 1st October, 1858, and that the rent was worth \$400 per annum. Plaintiffs next proved that, after the sale to them, they gave notice in writing to defendants of their purchase, and that they would hold them liable for the rent;

Jackson & Brothers vs. Mowry.

that *John A. Doane* took possession of the premises in *January, 1856*.

It further appeared, that *John A. Doane*, at the sale by the Sheriff, handed to him a claim to said premises, under and by virtue of a lease from *J. T. Doane*, extending from 1st January, 1855 to 1st January, 1860, said lease dated 16th day of December, 1854, and gave notice to bystanders that he held said lease; that the premises were sold either subject to this claim or in defiance of it. The Sheriff did not recollect which. That *John A. Doane* did not go into possession under said lease till about January, 1856, and that he subsequently sub-let a portion of the premises to *Jackson & Brother*, the defendants, from 1st January, 1858, to 1st October, 1858, for three hundred dollars. Defendants offered in evidence the lease from *John A. Doane* to them, dated 16th Dec., 1857, to the introduction of which plaintiffs objected, on the ground, that there was no proof of its delivery, or that it was executed at the time it purports to bear date. The Court sustained the objection, and excluded the paper, and counsel for defendants excepted.

Defendants then proved that they went into possession of the premises in December, 1857, and remained in possession till 1st October, 1858, under *John A. Doane*; that *John A. Doane* built a kitchen and barn on the lot, and repaired the store after the fire in April, 1857; that *J. T. Doane* was solvent in December, 1854, and remained so till the last of 1855, when he failed; *J. T. Doane* occupied the store till the last of the year 1855, but removed his family off the lot in May, 1855; and proved that others also rented portions of the premises of *John A. Doane*, after 1855, and paid him for them, and again tendered their lease in evidence, which the Court again repelled, and defendants excepted.

Defendants then proved the hand-writing of *Thomas C. Jackson*, one of the firm of *Jackson & Brother*, and that the signature to the lease was in his hand-writing, and again offered it in evidence, which the Court again repelled on the ground, that there was no proof it had ever been delivered, or that it was made at the time it purported to be, and counsel for defendants excepted.

Plaintiffs proved, that in 1855, *J. T. Doane*, in a conversation with their attorney, said, that there were no liens or incumbrances on his property other than plaintiffs' mortgage.

Defendants objected to proof of the sayings of J. T. Doane. The Court overruled the objection and admitted the proof—he being in possession at the time—and defendants excepted.

Counsel for defendants requested the Court to charge the Jury, that if plaintiffs knew, at the time their mortgage was taken, of the lease from J. T. Doane to John A. Doane, then they were estopped from objecting to it, and they ought to find for defendants—which charge the Court refused, but charged that if the lease was *bona fide*, plaintiffs could not recover.

Counsel for defendants further requested the Court to charge, that if the Jury were satisfied, from the evidence, that the Sheriff sold the premises subject to said lease, and notice thereof was given, then plaintiffs could not recover. The Court refused so to charge, but charged, that the main issue was, whether the lease was fraudulent or not; and if it was, plaintiffs were entitled to recover, whether the property was sold subject to it or not; and counsel for defendants excepted.

Counsel for defendants further requested the Court to charge, that if the lease was prior to the mortgage, if John T. Doane was in possession on the 16th December, 1857, and then rented to defendants till 1st October, 1858, for \$300. who had no notice of any fraud, then they were not liable—which charge the Court declined or omitted to give, and defendants excepted.

Counsel for the defendants further requested the Court to charge, that an action for use and occupation could not be maintained, if defendants held adversely to plaintiffs, which charge the Court refused to give, but held and charged, that that principle of Law did not apply in this case, as defendants set up no claim of title, but only a claim under a contract of rent, and defendants excepted.

The Court further charged the Jury, that the issue was not between plaintiffs and defendants, but between plaintiffs and John A. Doane, as to who were entitled to the rent, and if the lease was executed in secret, that was a badge of fraud, and if suits were pending against J. T. Doane, at the time, or he was insolvent, these were badges of fraud.

To which charge counsel for defendants excepted.

J. M. and W. L. CALHOUN, for the plaintiffs in error.

Cooper vs. Mullins.

HAYGOOD, COOPER, *contra*.*By the Court.*—LUMPKIN, J., delivering the opinion.

The action for use and occupation will not lie in this case.

It is argued, that in order to maintain this action, two things only are necessary to be proven, to-wit: title in the plaintiff and possession by defendant. And while it is true that a contract to pay rent may be implied from these data, yet, if it shall affirmatively appear, as it does in this case, that the tenant disclaims holding under the plaintiffs, no such presumption can arise.

It would be absurd to imply that A. agrees to pay B. rent for the land he lives on, when A. most stoutly denies it is B.'s land. And such, we understand, is the well-settled doctrine of the books upon this subject; and in conformity thereto have been the rulings of this Court.

COOPER vs. MULLINS.

1. The doctrine that servants of the same master cannot have redress against the master, for the consequences of each other's negligence in his service, being founded upon the policy of making each servant interested in the good conduct of the rest, cannot apply to a case where the respective situations of the servants allow no opportunity for the exertion of a mutual influence upon each other's carefulness.
2. Pecuniary injury is not the only one for which compensation ought to be allowed in damages.
3. A verdict will not be set aside as contrary to evidence, because it may conflict with the conclusions of a witness who drew his conclusions from the interchange of signs between himself and another person, and who testifies under a strong motive to support those conclusions.

Case, in Fulton Superior Court. Tried before Judge BUL at April Term, 1857.

This was an action brought by James Mullins against James F. Cooper, Superintendent of the Western and Atlantic Railroad, to recover damages for an injury, received by the plaintiff, and resulting from a collision of trains running on said Road.

Plaintiff proved by the attending physicians the nature and extent of the injury he received; that his left arm was broken in several places; the elbow was seriously and materially injured; that the injury was received in September, 1855, and that he was confined by reason of said wounds till the last of December thereafter; his elbow joint was still (at the time of the trial) stiff, and incurable in that respect; Dr. Dearing's bill for attention was about twenty-five dollars.

Plaintiff further proved, that he was in the employment of the *Georgia Railroad*, at the time of the injury, as an engineer; that he was formerly a machinist, and that he was incapacitated, by reason of said injury for a machinist, but not for an engineer, but that he could not, as an engineer, be able to *reverse* an engine so promptly as before.

The circumstances under which the plaintiff went upon the Western and Atlantic Railroad, upon the occasion of receiving the injury, were as follows:

The Machinist of the Georgia Railroad Shop, in the city of Atlanta, was applied to by an officer of the Western and Atlantic Railroad for an engine and engineer, to go up the Western and Atlantic Road, to bring down from Chattanooga a train of cars, as that Road did not have sufficient motive power to bring down the cars, which belonged to the Georgia Road, as fast as they were needed below; said officer saying that he wanted an engine and engineer to make a trip up the Road after them. In consequence of this application, Mullins was sent up the Road with an engine, with instructions from the Georgia Railroad to bring down only empty cars belonging to the Georgia Railroad. Plaintiff was willing to go, and was selected because he knew the Western and Atlantic Road, having made similar trips before. There was a general agreement between the two Roads that such service was to be paid for, and for similar services before rendered, the Georgia Road had been paid by the Western and Atlantic Road. This trip was not a gratuity; Georgia Road expected to be paid for the trip;

Cooper vs. Mullins.

plaintiff, while making this trip, was subject alone to the orders of the officers and agent of the Western and Atlantic Road.

Plaintiff further proved by the witness, Bruner, that, in making the trip under the circumstances above stated, on his return down with the cars, when about forty miles from where the accident occurred, he got behind with his train on account of his engine *foaming*, (there seemed to be several trains coming down at the same time) and was, therefore, not suited to run in front. The witness, who was engineer of the front train, displayed a flag, which indicated that another train was following—a signal well known to Railroad men. Plaintiff's train had the right to the track, even if he had been three hours behind the schedule time, the flag having preceded him; he was only about twenty-five minutes out of time when witness left him. There was no rule of the Road which required regular trains which might be out of time, to stop; the rule required other trains to wait for them and to keep the track clear. Plaintiff's train consisted of Georgia Railroad cars and a caboos belonging to the Western and Atlantic Road, and he was accompanied on the trip by a conductor of the Western and Atlantic Road, whose business it was to regulate the running of the train.

Plaintiff having closed, defendant read the depositions of Henry G. Cole, taken by commission, who deposed: That he had control of the engine and train at the Etowah embankment, in September, 1855; the engine and train were used for hauling earth into the embankment at the Etowah river; deponent and Kendrick were the contractors for said work; it was their daily practice to send the earth train after water to the station, about three miles and a half from the works; usually sent it after the express train; on the day of the collision, two express trains passed at schedule time, and we waited one hour and a half for the third, and finding our water was giving out, the engine was sent to the station for water; about fifteen minutes after it started, witness saw the train, of which Mullins was engineer, approaching; witness immediately took position at a conspicuous place near the track, and several times made the usual sign for stopping trains, called to the engineer and pointed to the pit, to show him that the earth train engine was not there, as he

passed, witness called aloud and told him that the way engine was on the track ; plaintiff made a sign with his hand which witness understood to mean that he would run the earth engine to Alatoona sideling. The sign made for stopping plaintiff was the usual sign for stopping trains. Plaintiff disregarded the signal, and his engine and the earth engine came together about three miles from the embankment. Witness walked to the place when he heard the collision, thinks neither engine was thrown from the track. The earth engine belonged to the Western & Atlantic Railroad, but was controlled by the contractors for doing the work at the embankment; don't think the engineers would have been hurt if they had remained on the engines.

The testimony being closed, counsel for defendant requested the Court to charge the Jury, that if plaintiff had hired himself to the Georgia Railroad, and that Road had with his consent hired him to the defendant for the service in which he was employed at the time he received the injury, then plaintiff was the servant of defendant. That such contract need not be an *express* one ; if in the usual course of dealing between them it had been customary for a compensation to be made for such services, then the law would imply a contract in the absence of proof of an express contract, and of any stipulation to the contrary. Which charge the Court gave with this qualification, to-wit: "But if the plaintiff was in the employment of the Georgia Railroad, and engaged in the business of that Road for its benefit, and paid by that Road for his services, the fact that he, during that trip, was subject to the orders of defendant, or its officers, and the fact that defendant paid the Georgia Railroad for said services, would not constitute plaintiff the servant of defendant in such sense as would bar his right to recover for injuries he received by the gross neglect and misconduct of the officers or employees of defendant, committed by them in the service of defendant.

To which charge counsel for defendant excepted.

The Court, amongst other things, further charged the Jury, that to entitle plaintiff to recover, it was not necessary for him to prove any specific pecuniary damages, but that they could find such damages, (if any) as under all the circumstances of the case, and the extent and nature of the injuries, they thought he was entitled to, but that they could not in this case give vindictive damages—counsel for defendant

Cooper vs. Mullins.

having requested him to charge that before plaintiff could recover, it was necessary for him to prove some pecuniary damages.

To which charge and refusal to charge, counsel for defendant excepted.

The Jury found for the plaintiff thirty-five hundred dollars. Whereupon counsel for defendant moved for a new trial on the grounds of error in the charges and refusals to charge as above stated, and because the verdict was contrary to Law and the evidence, and the damages found thereby excessive.

The Court overruled the motion for a new trial, and counsel for defendant excepted and assigns said refusal as error.

GLENN & COOPER, and BLECKLEY, for plaintiff in error.

J. M. CALHOUN & WM. EZZARD, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. The general rule is, that whoever is injured by the negligence of a servant in his master's business, is entitled to redress from the master. The Railroad, in this case, claims an exception against other servants of the same master. Such an exception has been recognized in some modern cases, but when confined within the reason on which it is founded, it can have no application to this case. That reason is one of public policy to secure to the public a more faithful service from employees on Railroads, steamboats and other branches of business wherein the safety and property of the public are involved, by making it the interest of each one of such employees to look after and encourage the carefulness and fidelity of all the rest. This reason can have no application to employees whose situations allow them no connective influence over each other. The exception operates as a penalty, and to impose the penalty when there is no opportunity of exercising that supervising care which it is intended to enforce, is sheer cruelty. In the case of *Scudder vs. Woodbridge*, 1 *Ga. Rep.* 195, this Court held that the exception did not extend to *slaves*, because slaves from their *status* were incapable of influencing their associate employees towards fidelity and care in the common business. Nor can it be extended to other employees who from *any cause* are not in

situation to exert such an influence on their fellows. It follows, therefore, that the cases to which this exception applies, are only those where the servant receiving the injury is engaged with the servant inflicting it, in a common business where he has an opportunity to exercise a preventive care over his negligence. In this case the person whose negligence produced the injury was on one train of cars, and the person who was injured was on *another train*, and had not the slightest possible opportunity of preventing the other's carelessness. To hold the employees on different trains of cars responsible for the carefulness of each other seems to me about as reasonable as it would be to exact such a mutual responsibility between employees on different Railroads, or in different quarters of the earth, because they might happen to be all servants of the same master. The reason of the exception is to make each employee a help to the carefulness of the rest, and where that object cannot be accomplished, the exception ought to cease, and the general rule of giving redress against the master to everybody who may be injured by the negligence of his servant in the performance of his business ought to prevail. But it is not even true that the two employees in this case were servants of the same master. The argument of the case mainly turned on this point, and therefore I will devote a few words to it, though notice of it is rendered unnecessary by the preceding view. One of the engineers was in the pay of the Western and Atlantic Railroad, and the other, Mullins, who was injured, was in the pay of the Georgia Railroad, and at the very time when he was hurt was doing a job for which the Georgia Railroad, and not himself, was to receive pay from the other Road. The Georgia Road furnished to the other an engine and engineer, that is to say, a team and driver for a single occasion.

Whose servant was that driver? In the case of *Laugher vs. Pointer*, 5 *Barn & Cressw.* 547, a stable-keeper had hired a team and driver to another person for a day, and the question was, whose servant was the driver? The Court of King's Bench were equally divided, but Judge Story, in a note to sec. 4586, of his work on Agency, says that all the subsequent cases have followed the opinion of those who held that the driver was the servant of him who had furnished him, and in whose pay he was, and not of him who had him but for a single occasion, who had no part in selecting him, and who

Cooper vs. Mullins.

was under no obligation to pay him. The parallel between that case and this seems to be complete. For these reasons a majority of the Court think that the doctrine relating to servants of the same master is not applicable to this case, and that the charge asked on it might have been refused instead of being merely modified as it was by the Judge.

2. The errors assigned upon the refusal of the Judge to charge that some *pecuniary* damage must be proven, and upon the excessiveness of the damages found, may be considered together, for the same view covers both. Surely, there ought to be some compensation for the *suffering* endured. The pain from the wounds must have been great, and the dread of the approaching collision between the two engines, though brief, must have been terrible. Mental agony has been known to turn a head gray in a night, and gray hairs are often but the effervescence of some great mental anguish. Shall all compensation be denied to such suffering merely because there can be no adequate compensation? We think not.

3. The ground that the verdict was contrary to the evidence rests upon its conflict with the testimony of Cole, tending to show that the accident was caused partly by negligence of the plaintiff himself. The engine which was in the wrong place had been put there by Cole's order, and he therefore testified under a strong motive to lighten the blame in that quarter and fix it upon Mullins. He made certain *signs* to Mullins, and Mullins made signs back to him, and the only important part of his testimony consists of the conclusions which he drew from Mullins' signs, as to the information which Mullins had got from his signs. Is it wonderful that the Jury did not place implicit reliance upon such conclusions of a witness so situated?

Judgment affirmed.

WILKINSON vs. JEFFERS & COTHRANS.

1. Where a negotiable note is transferred as collateral security after maturity, the legal title is vested in the holder, and a set off against the payee, is inadmissible as a defence to the action.

Complaint, in Coweta Superior Court. Tried before Judge HAMMOND at September Term, 1859.

This was an action brought by Jeffers & Cothrans, as endorsees against Uriah B. Wilkinson, the maker, on a promissory note, of which the following is a copy:

"\$302²²/₁₀₀. One day after date I promise to pay G. L. Anderson or order, Three hundred and two (²²/₁₀₀) Dollars, for value received. August 21st, 1857.

(Signed)

"U. B. WILKINSON.

Endorsed: "G. L. Anderson, per J. H. Anderson, Attorney."

Defendant pleaded the general issue and payment, and further, "that the said G. L. Anderson, the payee of said promissory note, transferred said note to the plaintiffs long after said note had become due and payable, and that the said payee transferred said note to plaintiffs as collateral security only, who received it as such security, and not in the usual course of trade, and at the time plaintiffs received said note, the payee thereof was, and still is, indebted to defendant a large sum of money, to-wit: the sum of five hundred dollars, for one thousand bushels of wheat, sold and delivered to said payee at his request by defendant, before said note became due, and after said note became due, and this the defendant is ready to verify," &c.

To which said last plea plaintiffs demurred, and after argument, the Court sustained the demurrer, and ordered the plea to be stricken. To which decision counsel for defendant excepted.

Y. J. LONG, M. KENDRICK and JOHN ERSKINE, for plaintiff in error.

SAM'L FREEMAN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The Mayor and Council of the City of Rome vs. James P. Perkins

The only question in this case is, whether a negotiable note being transferred by the payee, as collateral security, after maturity, the maker can plead a set-off against the payee, to an action at the instance of the holder ?

The point has been fully and satisfactorily discussed upon the cases. And while it is true that there is a conflict of authority both in England and in this Country, the better opinion seems to be, that the defense is not admissible; and such has been the uniform tenor of the decisions in this State. *Story on Prom. Notes*, § 186-195 and note; *Chitty on Bills* 74; 3 *Burrow* 1668; 2 *Kelly* 92; 3 *ib.* 47; 4 *ib.* 428; 18 *Ga. Rep.* 650; 22 *Ga. Rep.* 246; 27 *Ga. Rep.* 20; *Wheaton's Sel. Vol.* 132; *Chitty on Bills* 5-226; *Story on Prom. Notes*, 178; 5 *Cowen*, 231; *Creswell*, 558; 3 *Vermont*, 540; *Swift vs. Tyson*, 16 *Peters* 1; 20 *Hon. C. 5 Rep.* 343; 6 *Cush. Rep.* 469; *Story on Bills*, 192; 8 *Metcalf* 40; 3 *Cush. Rep.* 162; 20 *Vermont*, 569.

The legal title to the note is vested by the transfer in the holder, and notwithstanding the paper be over-due, no equity can be set up outside the contract itself.

THE MAYOR AND COUNCIL OF THE CITY OF ROME, vs. JAMES P. PERKINS.

1. The owner of land is entitled to just compensation before it can be taken for public use; if he see fit to waive his right and sell for the value of the property thus seized and appropriated, he can do so

Complainant in Floyd Superior Court. Tried before Judge Hammond at the January Term, 1860.

This was an action by the defendant in error, who was plaintiff in the Court below, against the Mayor and Coun-

The Mayor and Council of the City of Rome vs. James P. Perkins.

cil of the City of Rome, to recover compensation for certain lands belonging to plaintiff, which had been seized upon and appropriated by defendant for a public street in the city of Rome.

The defendant moved to dismiss the action upon the ground, that the same could not be maintained upon the allegations contained in plaintiff's declaration.

The court overruled the motion and defendant excepted.

The testimony being closed, the Jury found for the plaintiff \$285. Whereupon, defendant moved for a new trial on the grounds:

1st. Because the Court erred in not dismissing said action.

2d. Because the verdict was against the evidence.

3d. Because the verdict was against the Law.

The Court refused the motion for a new trial, and defendant excepted, and assigns as error said refusal.

R. D. HARVEY, represented by LESTER, for the plaintiff in error.

WRIGHT and SHROPSHIRE, represented by BUCHANAN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The Mayor and Council of Rome having seized and appropriated a portion of the real estate of the defendant in the city to a public street, the action is brought to recover of the corporation the value of the property thus taken. The Jury found two hundred and eighty-five dollars for the plaintiff, Perkins.

A motion was made and overruled before the case was submitted to the Jury, to dismiss the action. No exceptions was taken at the time to the decision; but this is made one of the grounds for setting aside the verdict and arresting the judgment.

We think this objection, if good at all, came too late after verdict.

The land-holder, instead of enjoining the corporation from taking his property before just compensation was made, or suing in trespass, brings his action to recover its value. If

Kirksey vs. Kirksey.

he is content to take this course, we do not see that the public can object. We shall require the plaintiff to execute and file the necessary release, to avoid all future misunderstanding.

The testimony was conflicting. The Jury have found the land to belong to the plaintiff, and we cannot say that their verdict is strongly and decidedly against the weight of evidence.

KIRKSEY vs. KIRKSEY.

1. If a wife, by Bill, sets up an ante-nuptial agreement by parol for the settlement of property, which is admitted by the husband, and the Statute of Frauds is not insisted upon, Equity will decree a specific performance.

In Equity, in Clayton Superior Court. Decision on demurrer by Judge BULL, at November Term, 1859.

This was a bill filed by Mary Kirksey, (by her next friend) against Elisha H. Kirksey, her husband, Jesse L. Blalock and others, and its object was to set up an ante-nuptial verbal agreement between complainant and the said Elisha H. relative to the property owned by her prior to their marriage, and which she might subsequently acquire. The marriage occurred about June, 1857. The bill further seeks to set aside and have declared void a certain deed of gift executed by said Mary in favor of her children by a former marriage, of a negro girl and 100 acres of land; this deed was executed just prior to her marriage with Kirksey, and which she executed when sick, upon the representation of her two sons, John F. and James H. Waldrop, that said paper was a Will. The Bill further seeks to set aside and annul a certain Bill of Sale executed by her husband, the said Elisha H., to Jesse L. Blalock, of the negro girl Suse, owned by complainant be-

fore her marriage with Kirksey, and which negro has been detained or taken into the possession of Blalock.

Defendants demurred to the Bill for want of equity. The Court sustained the demurrer, on the ground that the ante-nuptial parol agreement sought to be set up and enforced, is within the Statute of Frauds, and that marriage is not such a part performance as takes the case out of the Statute, and dismissed the Bill.

To which decision counsel for complainant excepts.

NORTON, GREEN & STEWART, for plaintiff in error.

HILL & CONNER, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We are clear that this Bill ought to be answered. If the husband confesses the ante-nuptial agreement and does not insist upon the Statute of Frauds in bar of its execution, there will be no obstacle in the way of decreeing its performance. And the case made by the Bill and admitted by the demurrer of the other three defendants, sternly demands the interference of a Court of Equity.

True, the husband might voluntarily make a conveyance and invest the trustee of his wife with power to institute proceedings against the other parties to recover the property. But it is better in the end to settle the whole matter in the present proceeding.

WOODRUFF vs. McGEHEE.

1. When an agent makes a contract for his principal, but conceals the fact that he is an agent, contracting as if he were principal, the principal may at any time appear in his true character, and claim all the benefits of the contract from the other contracting party, so far as he can do so without injury to that other by the substitution of himself for his agent.

Action for Breach of Warranty and Non-suit, in Troup Superior Court. Decision by Judge BULL, at November Term, 1859.

This was an action brought by Michael Woodruff against John W. McGehee, to recover damages for the Breach of a Warranty of soundness of a horse sold by defendant to plaintiff. The declaration alleged that plaintiff purchased the horse, by his agent William M. Lee, for the sum of two hundred dollars, and that defendant warranted said horse to be sound, whereas he was unsound and of no value.

Preliminary to the introduction of the paper or receipt containing the warranty, plaintiff read the answer of James N. Bethune to interrogatories, who deposed that "the purchase of the horse was made by Wm. M. Lee for Woodruff." Also, the answer of W. H. Griswold, as follows: "I do know of a horse purchased by Wm. M. Lee for plaintiff from defendant. Wm. M. Lee, as before said, purchased the horse for plaintiff at his request, Lee having engaged in the horse business, and being, as Woodruff thought, a judge of horses." Plaintiff further proved that the horse purchased by him as aforesaid was a sorrel horse. He then offered in evidence the following paper containing the warranty relied on, viz:

COLUMBUS, Ga., April 1, 1857.

"Received of Wm. M. Lee, two hundred dollars for a sorrel horse, which I warrant sound on delivery.

(Signed)

JOHN W. McGEHEE."

To the introduction and reading of which in evidence counsel for defendant objected. After argument, the Court sustained the objection, and excluded the paper, and plaintiff excepted and assigns said ruling as error.

J. H. Goss, for plaintiff in error.

B. H. BIGHAM, *contra*.

By the Court—STEPHENS, J., delivering the opinion.

The only reason assigned for the rejection of this warranty, is that it is made to the agent, the principal not being known in the transaction. But the authorities are express that the principal may claim all his rights, though not at first known, just as if he had been known, with the single limitation that the other party shall not lose any right which he would have against the agent if the agent were principal as he had first been supposed to be. *See Story on Agency, sec. 418.* The reason of the doctrine is, that it is but just that every man should have what really, though secretly, belongs to him, so far as he can obtain it *without injuring another* by appearing in his true character of owner. We think the action is maintainable in the name of the before unknown principal, and that the evidence ought to have been admitted. Judgment reversed.

STEPHENSON vs. CAMPBELL.

1. Process of Garnishment must be issued by a magistrate who is qualified to issue an Attachment, and such process issued by any other person, is void and cannot be the foundation of a valid Judgment.

Garnishment, in Meriwether Superior Court. Decision by Judge BULL at August Term, 1859.

James L. Stephenson instituted his actions of complaint respectively against James Renfroe and James W. Renfroe, returnable to the February Term, 1858, of Meriwether Superior Court, and on the same day before David Ellis, a Justice of the *Inferior Court*, he made affidavits that he apprehended

Stephenson vs. Campbell.

the loss of said debts, or some part thereof, unless summons of Garnishment issued. He gave the bond and security required by law in such cases, and the same with the affidavits were filed in the Clerk's office, and the Sheriff notified that Catlett Campbell was the person to be garnisheed. On the same day, to-wit: 1st Dec., 1857, the Clerk gave the certificate required by law, and handed the same, together with a copy of the affidavit, to the Sheriff, who attached them to a summons of garnishment, for said Campbell to appear at the February Term, 1858, and answer upon oath what effects of defendants he had in hand, or had at the time of service; said summons was signed by John S. Blalock, Sheriff of said County, and upon it was the following entry, "Served Catlett Campbell with a copy of the within personally, this 1st December, 1857." Said Campbell refused to answer at the February Term of said Court. At the August Term, 1858, judgments went against defendants, and Campbell still failing to answer, on the last day of said Term the usual order was taken to enter judgment against him; the judgment not having been entered at that Term, at the February Term, 1859, an order was taken to enter judgment *nunc pro tunc*. At the August Term, 1859, a motion was made to set aside said judgment upon the grounds, that the affidavits did not allege that deponent had reason to apprehend the loss, &c., and because the summonses of garnishment were illegally issued, the same having been signed and issued by the Sheriff, instead of by the Justice of the Inferior Court. Plaintiff insisted that the affidavit was in compliance with the Statute, and that it was too late, after judgment, for the garnishee to come in and plead any matter going to show that the proceedings were irregular or illegal.

The Court after argument granted the motion and set aside said judgment, on the ground that the summonses of garnishment should have been issued by the Justice; and the Sheriff having no authority to issue the same, the garnishee was not bound to answer or notice it.

To which decision counsel for plaintiff excepts.

HINTON & BULL for plaintiff in error.

GEO. A. HALL, *contra*.

By the Court—STEPHENS, J., delivering the opinion.

We think this judgment against the garnishee was properly held to be void, for the reason that there had never been any legal process against the garnishee. There cannot be a valid judgment without process. The process in this case was issued and signed by the Sheriff. The Act of 1856, see page 36 of the Acts of that year, provides that process of Garnishment shall be issued by a *magistrate* who is capable of issuing an Attachment, and makes *no other* provision for process of Garnishment. The Act then concludes by *repealing* all other Acts and parts of Acts in relation to Attachments and Garnishments. Therefore, the provision in the Act of 1856, is the *only* provision for process of Garnishment, and any process not in conformity with that provision, is without Law, and is no process at all.

Judgment affirmed.

MYRICK vs. VINEBURGH.

- 1 The evil which our Statutes against manumission were intended to prevent is not a reduction of the number of slaves, but an increase of the free negroes within the State—hence, an instrument providing for manumission outside of the State is not within the Statutes.
- 2 The Supreme Court being a Court of review only, will not hear, in support of a plea, evidence which was not before the Court below.

Motion to set aside and revoke Probate of Will, and Caveat thereto, in Monroe Superior Court. Decision by Judge CABANISS, at February Term, 1859.

At the instance of Septimius Myrick, an heir at law of Nathaniel T. Myrick, deceased; a rule Nisi issued from the Court of Ordinary of Monroe county, calling upon Isaac

Myrick vs. Vineburgh.

Vineburgh and Benj. F. Ward, the executors of the last Will and Testament of said Nathaniel T., to show cause why their letters testamentary should not be revoked, the probate of said Will set aside, and said last Will and Testament declared void, upon the following grounds, viz :

1st. Because said Will is illegal and void, being an attempt to manumit and set free certain slaves therein named, contrary to the Statutes of the State of Georgia in such cases made and provided.

2d. Because so much of said Will as attempts to give certain slaves, therein named, the property of deceased is illegal and void.

3d. Because the bequests to Isaac Vineburgh and Benj. F. Ward, are void, being contrary to Law.

At the December Term, 1858, of the said Court of Ordinary, the said executors appeared, and in answer to the said rule say—

1st. That said Will was duly executed by said Nathaniel T. Myrick, deceased, in his life-time, and does not contravene any Law of this State in any of its provisions, and that the same is a good and valid disposition of the estate of deceased.

2d. And said executors further say, that they have heretofore, and before the granting of said rule Nisi, at the instance of said Septimius Myrick, and all the other heirs at Law, and next of kin of said Nathaniel T. Myrick, deceased, to-wit : at the December Term, 1856, of said Court of Ordinary, and at the August Term, 1857, of the Superior Court of said county, said cause being on the appeal from the Court of Ordinary in said Superior Court, duly proved said last Will and Testament in solemn form of Law, and upon the evidence then and there submitted on said appeal, the Jury empannelled to try said cause, found said paper propounded to be the last Will and Testament of said Nathaniel T. Myrick, which finding was afterwards, upon a bill of exceptions, affirmed by the Supreme Court of the State of Georgia, and in which all the grounds taken by movant in this rule, were taken and considered, and decided against the heirs at Law. Of which proceedings, trials and judgments, the said Septimius had notice, and was a party to the same. And therefore said respondents plead said former proceedings and judgments in bar to this proceeding, and in bar of any further showing on their part, and ask the judgment of the

Myrick vs. Vineburgh.

Court whether they shall be required again to prove in solemn form said last Will and Testament of said Nathaniel T. Myrick, deceased.

The Court, after argument, overruled each and all the grounds taken in said Rule, and dismissed the same.

To which decision counsel for Septimius Myrick excepted, and assigned the same as error.

BLANFORD & CRAWFORD, for plaintiff in error.

PRICHARD, represented by TRIPPE & PEEPLES, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. This Will directs certain negroes of the testator to be removed to some free State, *and there* manumitted; and that certain property shall be *there* bought for them. This does not violate the policy of our Statutes against manumission, as that policy has been more than once expounded by this Court. The evil at which those Statutes strike, is manumission *within this State*; the design was not to prevent the reduction of slaves, but to prevent an increase of free negroes in the State. If the testator takes care, first to get his negroes out of our way, he may do what he pleases with them after that. If the Will gives the slave his freedom to be enjoyed but for one hour within the limits of Georgia, it is void; but if, with an honest intent to put him out of our way and keep him there, it *carries him over the State line as a slave*, it may make what it pleases of him afterwards. We think the Court was right in sustaining this Will.

2. It may not be amiss to remark, that the defendants here who are the propounders of the Will, cannot avail themselves of the former judgment, *now*, for the reason that they did not produce it in the Court below. They pleaded it in the Court below, but the Bill of Exceptions does not inform us that they produced it in evidence. That plea was a naked one, unsupported by evidence, and the evidence cannot now be heard in this Court. This Court is one of *review*.

Judgment affirmed.

King vs. Mitchell.

KING vs. MITCHELL.

1. A paper which merely acknowledges the reception by one person of a promissory note from another, is not a contract, and does not exclude all evidence showing the contract under which the note passed from the one to the other.

Assumpsit, in Floyd Superior Court. Tried before Judge HAMMOND, at January Term, 1860.

This was an action brought by Joshua King against Daniel R. Mitchell, Esq., an Attorney at Law, for recovery of damages for neglect of duty in failing to collect a note which plaintiff had put into his hands for collection.

On the trial of the case, the plaintiff introduced in evidence a receipt, of which the following is a copy, to-wit:

"ROME, January 8, 1857.

"Received of Joshua King, per A. J. Bearden, a note on John M. Phinizy, dated 12th of December, 1856, due thirty days after date, for Four Hundred Dollars.

"D. R. MITCHELL."

It also appeared from the testimony that the note mentioned in the receipt was sued on by Mitchell & Harris, (who were law-partners,) on the 9th of April, 1857, in Floyd Inferior Court, and that judgment was obtained on the note; at the November Term, 1857, of said Inferior Court; that a *fi. fa.* issued from the judgment, which was returned *nulla bona*, on the 6th of April, 1858; that all the *fi. fas.* against Phinizy, which were obtained at the August Term, 1857, of Floyd Superior Court, were paid off by a sale of Phinizy's property by the Sheriff.

There was a good deal of other testimony introduced, the object of which was to show that, if the note for which the receipt was given, had been sued on to the Superior, instead of the Inferior Court of Floyd county, the money due on the note could have been collected, and that the plaintiff had, therefore, lost his money by the negligence of the defendant Mitchell.

Pending the trial, the plaintiff proposed to prove by A. J. Bearden, that the note was given to D. R. Mitchell, as an

Attorney at Law, for collection; and that it was received by said Mitchell for that purpose. To the introduction of which evidence the said defendant objected, and the Court sustained the objection and repelled said evidence, to which decision plaintiff, by his counsel, excepted. Plaintiff then proposed to prove by A. J. Bearden, that he, as the agent of the plaintiff, when he gave said note to the defendant, instructed him to bring suit on said note, and in no case to let return day to the next Superior Court pass. The Court sustained objection to, and ruled out said evidence, and the plaintiff, by his counsel, excepted.

When the testimony had closed:

The Court charged the Jury, that the receipt offered in evidence by the plaintiff imposed no obligation on defendant to collect said note, or to bring suit on the same, and the plaintiff cannot, by parol evidence, vary or add to the terms of the receipt; and it is necessary in order to charge the defendant in this case, for the plaintiff to show that defendant received said note as an Attorney at Law, for the purpose of collecting it, and that he neglected to comply with his agreement. If the Jury believed that the defendant did receive said note for collection, and by his negligence the debt was lost, then the defendant is responsible, and not otherwise. The measure of damages is the loss sustained by defendant's neglect, if the Jury should believe that defendant has been guilty of neglect.

The Jury returned a verdict for the defendant; and the plaintiff during the regular Term of said Court, moved for a new trial on the following grounds, to-wit:

1st. Because the verdict is contrary to Law.

2d. Because the verdict is strongly and decidedly against the weight of evidence.

3d. Because the Court erred in refusing to permit the plaintiff to prove by A. J. Bearden, that the receipt offered in evidence was given by the defendant as an Attorney at Law for a note given for collection.

4th. Because the Court erred in refusing to permit plaintiff to prove by A. J. Bearden, that he, as the agent of Dr. King, instructed the defendant, when he gave him the note, to bring suit on said note at the first Term of Floyd Superior Court, and in no case to let Return Day pass without suit.

King vs. Mitchell.

After argument had, the Court overruled the motion on all the grounds taken, and the plaintiff excepted, and says that the Court erred in not granting the new trial on all the grounds taken on said motion, and plaintiff further says that the Court erred in charging the Jury, that the receipt offered in evidence created no legal obligation to collect said note or bring suit on the same.

SHROPSHIRE, PRINTUP and TERHUNE, for the plaintiff in error.

UNDERWOOD, *contra*.

By the Court—STEPHENS, J., delivering the opinion.

The plaintiff introduced in evidence a paper signed by the defendant, acknowledging that the defendant had received from the plaintiff a promissory note on a third person, but silent as to the reason why, or the purpose for which, the possession of the note had been changed from the one to the other. The plaintiff then offered to prove by a witness, that the defendant, who was an Attorney at Law, received the note for the purpose of collecting it for the plaintiff, and with instructions to sue on it immediately. On objection by the defendant, the Court rejected the testimony upon the ground, that parol evidence was not admissible to enlarge the terms of the receipt, he holding that the receipt itself imposed no obligation to collect the note. We think this is an erroneous view of the receipt. It is not a contract, for it does not express any undertaking on either side. It is merely an acknowledgment of a *fact*, that the property of the note was in the plaintiff. From that one fact, it follows, that he had a right to do what he pleased with it, and that the defendant, who took it, was bound to pursue his instructions concerning it, or if he were unwilling to do so, then to return it to him. The *legal effect* of the receipt itself was an undertaking by the defendant, to hold the note subject to plaintiff's order, so long as he should hold it at all. Of course, it was competent for the plaintiff to show what orders he had given.

Judgment reversed.

WILLIS et al. vs. JENKINS.

1. The ordinary popular and legal sense of the word "children," embraces only the first generation of offspring; and for it to be extended further, there must either be something in the context showing that a larger signification is intended, or the person using it must know that there neither then is, nor can afterwards be, any person to whom the term can be applied in its appropriate sense.
2. A Will cannot be reformed by making additions to it, because the whole Will must be in writing *ab origine*.

Bill in Equity, in Pike Superior Court. Demurrer sustained by Judge CABANISS, at Chambers, 1st February, 1860.

This was a bill brought by the children of Sarah Willis, deceased, against the executor of her father, John Jenkins, deceased, for the recovery of a residuary legacy contained in the 6th item of the Will, in these words: "All the rest of my estate, not herein specially disposed of, real as well as personal, I give to my beloved wife, Polly, during her life and the continuance of her widowhood, and after her death, the land I now live on, in the county of Pike, to go to my son, John R. Jenkins and his heirs forever, and the rest of my estate, real and personal, to be equally divided according to valuation, among such of my children (sons and daughters) as may, at the death of my wife, be in life." Mrs. Willis, the mother of complainants, and daughter of the testator, died before her father. The widow survived the testator. The complainants claimed on two grounds: 1st, That under the words as they stand, they were entitled to what would have been their mother's share, if she had been in life at the death of the testator's wife; and 2d, That the legal effect of the words, as they stand, had been mistaken by the testator, he having intended to give, and supposing that he had used such words as did give to the complainants what would have been their mother's share, if she had survived the widow. The prayer of the bill was accordingly in the alternative. That their construction of the words used might be decreed, or that failing, then that the Will should be so reformed as to express the true intention of the testator. A general demurrer to this bill was sustained by the Judge, and that decision is excepted to and assigned as error.

Willis et al. vs. Jenkins.

GREENE & STEWART, for plaintiff in error.

GIBSON & MOORE, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. We think that these complainants are clearly not entitled to anything under this Will, as it stands. The clause under which they claim, is to *such children (sons and daughters)* of the testator as shall be *in life at the death of his widow*. The mother of these complainants, Mrs. Willis, was a child of the testator, but she was *not* in life at the death of his widow. She therefore took nothing; and they cannot get anything through her. It is equally clear that they cannot take in their own right. For them to do so, they must be embraced in the description of "*children—sons and daughters*" of the testator; but they are not his *children—sons and daughters*, but only *grand-children—grand-sons and grand-daughters*. There is no rule of law which can make the term "*children*" in this case cover *grand-children*. The word *child* has neither a popular nor a legal technical signification which includes *grand-child*. Both in popular and in legal parlance, it embraces only the first generation of offspring. It can acquire a more extensive meaning only from the context in which it occurs, or from its use in a case where the person using it must know that there neither then is, nor can afterwards be, any person within the first generation to whom it can be applied. 1 *Jarman on Wills*, 52. In this case the context indicates rather its strict sense than an enlarged one, for it gives "*children*" the additional description of "*sons and daughters*." The context, instead of changing the usual sense of the word, confirms it. Nor is there an absence of objects who fall within the usual meaning of the word. There were, when the Will was written, and there have been every day since, a number of persons answering the description of "*children*," in the usual and correct sense of the term. There was not a single reason suggested why *grand-children* should be embraced in this case, except the hardship of leaving them out. That is not a legal reason, and if it were, it is counterbalanced by the hardship of letting them in. The Will is express that the division among these "*children*" (whoever they may be, whether *sons and*

Wilks & al. vs. Jenkins.

daughters" only, or these, together with grand-children,) shall be an equal one. Each one who takes at all, takes as much as any other one; that is to say, each grand-child would take as much as any child would, if grand-children are to take at all. To put grand-children, as a class, on the same footing with children, would scarcely be less unnatural than the exclusion of grand-children altogether. The words of this Will are so specific and so appropriate that they cannot possibly be made to extend to grand-children.

2. Can this Will be reformed by striking out and inserting? We think not. There is no doubt that on a different issue, to-wit: the issue of *devisavit vel non*, all parts of the propounded paper to which the testator had not assented ought to be rejected; but to allow the insertion of anything into it, upon *parol proof*, would be to set aside the law which requires the Will—the whole Will—to be in writing. I know that contracts which are within the Statute of Frauds are allowed to be reformed by inserting such things as may have been omitted from the writing through fraud, mistake or accident; but contracts and wills are placed on very different footings by that Statute. Wills must be wholly in writing *ab origine*; contracts need not be. In the case of contracts, the Statute, carefully distinguishing between the whole, and less than the whole, accepts less as sufficient, for its requirement is in the alternative; the "agreement, or some note or memorandum thereof" must be in writing. The mere jottings of a memorandum will satisfy the Statute and put it out of the way. It is true, the Courts have then to cope with the rule which excludes *parol* evidence when offered to vary or add to the writing; but this rule they hold to be inapplicable to a writing which has been prevented from being what the parties intended it to be, by fraud, mistake or accident. This rule is as little in the way of reforming a will as of reforming a contract. In either case, the rule offers no obstruction to the reformation of the writing so as to make it what it was intended to be, whenever the failure to have it so from the beginning has resulted from fraud, mistake or accident. So far as this rule is concerned, contracts and wills are equally affected by it. But the Statute affects the two very differently. Under the conjoint operation of the rule and the Statute, the doctrine with respect to contracts is, that if the parties leave a written vestige, this may serve

Camp vs. Matheson & O'Harra et al.

as a skeleton on which *parol* evidence can hang such lacking components of the perfect form as may have been withheld by fraud, mistake or accident. But not so with a will. The Statute demands that the whole of it shall be in writing. This view is strongly presented by Mr. *Jarman*, in his treatise on *Wills*. 1 *Vol.*, page 849.

Judgment affirmed.

CAMP vs. MATHESON & O'HARRA et al.

1. When a bill is presented to the Judge, praying an injunction, and it appears upon its face that the complainant has ample redress at Law ; and especially if the statements are inconsistent and contradictory, it is the duty of the Judge to refuse his sanction.

In Equity, in Butts Superior Court. Decision by Judge CABANISS, at Chambers, 10th September, 1859.

This was a bill by Nathan F. Camp, against Mattheson & O'Harra and others, creditors of complainant, for an injunction to restrain defendants from selling and disposing of certain goods, or a remnant of a stock of goods, bought by defendants, through their agent, from the complainant, and by him turned over and delivered to them in payment and satisfaction of their claims against him ; and further, to enjoin them from dismissing their actions at Law, pending for the recovery of those claims, and from transferring said claims.

Judge CABANISS, to whom the bill was presented for his sanction, and for an order for the injunction prayed, refused the same, and passed the following order :

"In Chambers, Sept. 18th, 1859. The injunction prayed for in the within bill is refused, on the ground that there is no Equity in the bill to authorize an order and prevent the plaintiffs in the Common Law actions from dismissing their

suits if they see proper to do so; nor to authorize an order for the arrest of defendants, and to stop the sale of the goods which have been turned over to the agent of defendants to pay their demands against complainant; and further, it is refused because the 9th rule in Equity has not been complied with."

To which refusal to grant the injunction prayed for, counsel for complainant excepts, and assigns as error said refusal.

The facts stated in the bill, and relied upon as constituting its Equity and grounds for the injunction, are sufficiently recited and set out in the following opinion of the Court.

L. T. DOYAL, for plaintiff in error.

J. J. FLOYD, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This is the second time this case has been before this Court, and whether we look to the bill alone, or to the bill and the agreement which is appended, we see nothing to require the interposition of a Court of Equity.

The case is simply this: In 1836, the complainant, who was a merchant, found himself in failing circumstances. He owed debts in New York and Charleston to a large amount; and besides these, there were others which had already gone into judgment against him in Butts county. A Mr. Alemond presents himself as the agent of the city debts, amounting to \$5,095 25. Suits had already been brought up on a portion of these claims. He entered into a contract with Mr. Camp to take his stock of goods for the demands which he held. It was further stipulated that if the goods, or any part of them, should be seized and sold by the outstanding judgments, in that event the suits then pending at the instance of the city creditors were to proceed to judgment and be enforced against any other property belonging to the defendant to cover any loss resulting from the appropriation of the goods to the judgments then outstanding against the complainant. This was the contract.

In the bill presented to the Judge, and refused by him, it is alleged that these old *fi. fas.* have been satisfied out of other property belonging to Camp. Very well. This is just

Camp vs. Matheson & O'Hara & al.

what should have been done. He asks that the defendants may be enjoined from prosecuting their actions against him. He does not pretend that they are attempting or even threatening to do so. Suppose they did: he can show that they are paid off by the sale of his stock of goods. He further prays that they may be restrained from dismissing their suits; that is, that they may neither go forwards nor backwards, on nor off with their suits. For aught that appears or is insinuated, they are standing perfectly still. But why not dismiss these cases, provided they are discharged and the agreement annexed to the bill shows that they are paid? If retained under these circumstances, they would furnish no pretext for the Court in Butts county to take jurisdiction over these non-residents; and this is the object for which they are sought to be retained.

The complainant further prays, that the defendants may be prevented from transferring his paper to third persons. What if they did? He will be entitled to the same defense against this overdue, dishonored and discharged paper in the hands of third persons, with or without notice; as if sought to be enforced by the original payees. He prays the Court to stop them from selling the goods. Wherefore? Have they not bought and paid for them? But suppose they have not: how can it be ascertained how balances stand until the goods are sold? What profit will it be to any one to have them consumed by moth and rust?

He avers that a fraud was practised upon him by Among in this: that he represented that he had deposited cash to take up the outstanding judgments. But how is this statement reconcilable with the fact, that the complainant stipulated expressly that they were to be paid out of his property? And that if they were not, and the goods had to be taken for that purpose, Among was to carry his cases to judgment and collect them out of the defendant?

He claims an accounting, and that if the claims against him were bought at a depreciation, that he may be allowed the benefit of it. But how can this be, when the agreement shows that he made an absolute sale of his stock of goods to pay these claims?

We hold the Court did right to refuse the injunction.

ASKEW vs. DUPREE.

1. Notwithstanding the Statute directs a License to issue in case of Marriage, and inflicts a penalty upon any minister of the gospel or magistrate who performs the ceremony without such License; yet, in the absence of any positive enactment declaring that all marriages not celebrated in the forms prescribed shall be void, a marriage deliberately and intentionally entered into *per verbi de presenti*—that is, “I take you to be my wife,” and, “I take you to be my husband”—by parties able to contract, is to all intents and purposes a valid marriage, notwithstanding the parties have failed to comply with the statutory provisions.

In Equity, in Pike Superior Court. Decision by Judge CABANIS, November Term, 1859.

James F. Dupree and his wife Uriah E. Dupree, filed their bill in Equity against Uriah Askew, for an account of the estate of Mrs. Dupree in defendants hands, as her guardian, and also to recover the remainder of her distributive share of the estate of her deceased father, in the hands of defendant, as administrator. The Bill alleged the marriage of complainants, and the right thereby of said James F., by virtue of said marriage to recover and receive the estate and amount belonging to and due his wife.

To this Bill the defendant pleaded in abatement, that complainants were not man and wife, and they were misjoined as complainants. That they were never lawfully married; that the pretended marriage between them was solemnized by A. Buckner, as a Minister of the Gospel, but that said Buckner was not at the time of the solemnization of said pretended marriage, a Minister of the Gospel of any christian order or denomination, and was not clothed with any ministerial powers or functions, but had long before that time, to-wit: at the August Conference in the year 1855, of the Griffin Baptist Church, been deposed from the ministry of said Church, and his credentials as such surrendered, cancelled and revoked, and said Buckner excommunicated from said Church, by means whereof he became, and was totally disqualified to perform marriage rites and ceremonies, and that said marriage was null and void.

To this plea complainants demurred. The Court sustained the demurrer, and held the plea insufficient in Law.

Askew vs. Dupree.

To which decision counsel for defendant excepted, and assigned the same as error.

It may be proper to add, that the marriage between complainants was solemnized 25th Dec., 1855, and that a Marriage License had been taken out dated 24th Dec., 1855, and upon which was endorsed the following, viz :

"I certify that Mr. J. F. Dupree and Miss U. E. Askew were duly joined in matrimony by me, this 25th day of December, 1855.

(Signed)

"A. BUCKNER, M. G."

GREEN & STEWART, for plaintiff in error.

PEEPLES & CABANISS, DOYAL & CAMPBELL, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

As an act of justice to the ability and research of Judge CABANISS, I have determined to publish his opinion in this case without alteration or abridgement. It is entitled to be preserved in a permanent form, as a monument of the learning and industry of that most excellent man and magistrate. Says the Judge :

"The Bill is filed by James F. Dupree and his wife Uriah E. Dupree, against Uriah Askew, to recover the amount due said Uriah E. Dupree from said Uriah Askew, as her guardian ; also the remainder of her distributive share of the estate of her deceased father, now in the hands of the defendant as his administrator. The Bill alleges the marriage of the complainants, and the consequent right of James F. Dupree, by virtue of their inter-marriage, to recover and receive the amount due his wife.

"To this Bill the defendant has filed a plea in abatement, and for cause of plea says that said Bill of said complainants ought to be abated and dismissed, because he says that said complainants were not in terms of the Law, in such cases made and provided, duly and legally married as set forth and alleged in said Bill, and that the said James F. Dupree is not, and never has been legally the husband of the said Uriah E., and therefore is not entitled to have, or maintain the said suit as co-complainant with the said Uriah E. for the re

covery of any of the matters, or things set forth in said Bill.

"And the defendant further says, that the pretended marriage between the said complainants, James F. Dupree and Uriah E. Askew, was pretended to have been solemnized by one A. Buckner, as a Minister of the Gospel, when he the said Buckner, was not then and there a minister of the gospel of any christian order whatever, and was not in any way clothed with the power of ministerial ordination, but was long before that time, to-wit: at the August Conference in the year 1855, of the Griffin Baptist Church, required to render up to said Church his credentials, as a Minister of the Gospel, which he then and there did, which said credentials were then and there cancelled, revoked and annulled, and the said A. Buckner then and there excommunicated from said Church, by means whereof the said A. Buckner became, and was totally disqualified to perform marriage ceremonies. All of which matters and things the defendant doth aver to be true, and pleads the same in abatement of said bill, and demands the judgment of the Court, whether he ought to make any answer to said Bill of complaint.

"To this plea the complainants have demurred, and the question for the determination of the Court is, admitting the facts set forth in the plea to be true, is the marriage of the complainants valid? Admitting that A. Buckner at the time he performed the marriage ceremony between James F. Dupree and Uriah E. Askew was deprived of his functions as a Minister of the Gospel, and was excommunicated from the Church of which he had previously been a member, is the marriage of the parties valid and binding according to Law? Do they legally bear and sustain to each other the relation of husband and wife? If yea, the complainant, James F. Dupree, has the right, by virtue of his inter-marriage with Uriah E. Askew, to recover and receive whatever amount is due her from her guardian, and the administrator of her deceased father. If he has not been lawfully married to her, and is not her husband, he has no such right of recovery.

"The sole question, then, made by the plea and the demurrer thereto, is the validity of the marriage between the complainants.

"Another question which was discussed by counsel, both for complainants and defendants in the argument before the

Court, viz : whether A. Buckner was a Minister of the Gospel at the time he performed the marriage ceremony, is not legitimately made by the plea and demurrer.

"The plea alleges that he was deprived of his ministerial functions—was excommunicated from the Church of which he had been a member ; that he was required to surrender up his credentials as a Minister of the Gospel, which he did, and therefore they were cancelled, revoked and annulled. The demurrer admitting, these facts to be true ends, that question. According to facts admitted to be true, he was not then and there a Minister of the Gospel.

"His authority to act as a Minister of the Gospel was derived from the church of which he was a member at the time of his ordination, and when that authority was revoked and taken from him, he ceased to be a minister.

"Such are the facts alleged in the plea ; their truth is admitted by the demurrer, and the conclusion follows as a matter of course.

"But the true question in this case, and one of no small magnitude and importance, is this : Is a marriage when the ceremony is performed by an unauthorized person, valid and binding in Law ?

"Let us, in the first place, ascertain the legal principles which are involved in this question. And the first, and the foundation of all the rest, is that marriage is a civil contract. It is so defined in all the elementary works, and in the two most generally approved and used in this country—Blackstone's and Kent's Commentaries ; and it is so defined by Judges learned in the Law in decisions pronounced by them.

"Sir William Scott, who was not surpassed for learning and ability by any Judge who ever presided in any of the Courts in England, in one of his best considered, and most elaborate opinions, *Dalrymple vs. Dalrymple*, 4 *Eng. Eccl. Rep.* 485, has exhausted the learning on this subject. He says, 'Marriage, in its origin, is a contract of natural Law'—'in civil society, it becomes a civil contract, regulated and prescribed by Law, and endowed with civil consequences.'

"Perhaps the most accurate definition of marriage is found in *Bishop on Marriage and Divorce*, sec. 29.

'The word marriage is used to signify either the act of entering into the marital condition, or the condition itself. In the latter and more frequent legal sense, it is a civil status,

existing in one man and one woman, legally united for life for these civil and social purposes, which are based in the distinction of sex. Its source is the Law of Nature whence it has flowed into the municipal Laws of every civilized country, and into the general Law of Nations. And since it can exist only in pairs, and since no persons are compelled, but all who are capable are permitted to assume it, marriage may be said to proceed from a civil contract between one man and one woman of the needful physical and civil capacity.

"Again, in sec. 31, he says, though 'marriage in Law writings is generally denominated a contract; yet it is said to be more than a contract, and to differ from all other contracts.'

"In accordance with this is Judge Story's view of marriage in his *Conflict of Laws*. In sec. 200, he says, 'Marriage is not treated as a mere contract between the parties, subject as to its continuance, dissolution and effects to their mere pleasure and intentions. But it is treated as a civil institution, the most interesting and important in its nature of any in society.'

"Again, in a note to sec. 108, he says, 'I have throughout treated marriage as a contract in the common sense of the word, because this is the light in which it is ordinarily viewed by Jurists, domestic as well as foreign. But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belongs to ordinary contracts.'

"That eminent Jurist, whose opinion has already been quoted, in an elaborate judgment, rendered in the case of *Lindo vs. Beliano*, 4 *Eng. Eccl. Rep.* 373, says, "The opinions which have divided the world, or writers at least, on this subject, are generally two. It is held by some persons that marriage is a contract merely civil; by others, that it is a sacred, religious and spiritual contract, and only so to be considered. The jurisdiction of the Ecclesiastical Court was founded on ideas of this last described nature; but in a more correct view of this subject, I conceive that neither of these opinions is perfectly accurate. According to juster notions of the nature of the marriage contract, it is not merely either a civil or religious contract; and at the present time, it is not to be considered as originally and simply one or the other. It is a

contract according to the Law of Nature, antecedent to civil institution, and which may take place to all intents and purposes, wherever two persons of different sexes engage by mutual contract to live together."

"Such is marriage and the marital relation. It is founded upon and grows out of a contract. In the next place, what is necessary to make the contract? As in all other contracts, the consent of the parties, for without that, there can be no contract; but when that is given, and mutually declared, the contract is made, and the marriage relation supervenes, and no form of ceremony is prescribed by Law to carry into effect the agreement of the parties.

'It is not unworthy of remark,' says Sir William Scott, 'that amidst the manifold ritual provisions made by the Divine Law-giver of the Jews for various offences, and transactions of life, there is no ceremony prescribed for the celebration of marriage.'

"And it is equally true, that none is prescribed by the Common Law, or our Statutes in relation to marriage.

"Marriage, then, in its inception, by the Common Law, is a civil contract founded on the consent of the parties.

"Any mutual agreement between the parties to be husband and wife in *presenti*, especially where it is followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of either to contract matrimony." *Rose vs. Clark*, 8 *Paige*, 574.

"Marriage being a contract, is of course consensual, for it is of the essence of all contracts to be constituted by the consent of both parties. *Consensus non concubitas, faciat matrimonium*, the maxim of the Roman Civil Law is, in truth, the maxim of all Law upon the subject; for the *concubitas* may take place for the mere gratification of present appetite, without a view to any thing further; but a marriage must be something more; it must be an agreement of the parties, looking to the *consortium vitæ*; an agreement indeed of the parties capable of the *concubitus*, for though the *concubitus* itself will not constitute marriage, yet it is so far one of the essential duties for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract.

"Marriage being a civil contract, it is not necessary that it be solemnized by a person in holy orders, and in *facie ecclesiæ*.

In the Roman Catholic Church, marriage is a sacrament; and in countries where that religion prevails, and is established by Law, marriages are required to be solemnized by a priest, and in the Church; but it is not so here, for our Statute enacts, that marriage licenses may issue, directed to any Judge, Justice of the Superior Court, or Justice of the Peace, as well as to Ministers of the Gospel.

"If the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesie*. There is no recognition of any ecclesiastical authority, in forming the connection; and it is considered entirely in the light of a civil contract. This is the doctrine of the Common Law, and also of the Court Law which governed marriages in England prior to the Marriage Act of 26 Geo., 2d.

"The Supreme Court of the United States, *Jewell vs. Jewell*, 1 *Howard's Rep.*, 219, were equally divided in respect to the proposition in the above paragraph, and gave no opinion.

2 *Kent. Com.*, 7th Ed., top page 52, near 87, and note.

"The same question came before the House of Lords, in England, in 1844, in the case of the *Queen vs. Millis*, reported in 10 *Clark and Finnelly*, 534.

"The question was, Whether the marriage of the defendant Millis, who was a member of the established Church, to a woman in Ireland by a Presbyterian minister, according to the form which was usual with that denomination, was valid?

"The question was referred by the Lords to the Judges and Lord Ch. J. Tindal gave their unanimous opinion against the validity of the marriage, and held that, by the Law of England, as it existed at the time of the Marriage Act, a contract of marriage *per verba de presenti*, was indissoluble between the parties themselves, and afforded to either of them, by application to the Spiritual Court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The civil contract

and the religious ceremony were both necessary to a perfect marriage by the Common Law.

"The Lords who gave judgment were equally divided: Brougham, Denman and Campbell being in favor of sustaining the first marriage; the Lord Chancellor, (Lyndhurst,) Cottenham and Abinger being of the opposite opinion.

"Chancellor Walworth considers the ancient Common Law doctrine to have been, that the marriage was invalid, unless celebrated *in facie ecclesie*; but adds: 'The Law on this subject, however, was unquestionably changed at the Reformation, if not before.' *Rose vs. Clark*, 8 *Paige*, 574.

"But the doctrine, that, to give validity to a marriage, it is necessary that it be solemnized by a person in holy orders, has never obtained in any of the States of this Union.

"It is not necessary," says Judge Kent, (2 *Kent*, 53-87) 'that a clergyman should be present to give validity to the marriage, though it is doubtless a very becoming practice, and suitable to the solemnity of the occasion. The consent of the parties may be declared before a magistrate, or simply before witnesses, or subsequently confessed, or acknowledged, or the marriage may even be inferred from continual cohabitation and reputation as husband and wife, except in cases of civil actions for adultery, or in public prosecutions for bigamy or adultery, when actual proof of the marriage is required.'

"*Bishop on Mar. and Div.*, Sec. 167: 'Assuming, then, that the contract *per verba de presenti*, or *per verba de futuro cum copula*, is at Common Law, a complete marriage, we are next to seek for the rules of interpretation by which to determine whether, in a given case, a Statute has altered the Common Law upon the subject.

"Has our Statute, in relation to marriages, changed the Common Law? and is a marriage celebrated by any person other than those to whom the Statute prescribes that marriage licenses shall be directed, valid and binding in Law?

"Upon this point, 'the leading rule, and one of great importance, will be found to be, that the marriage at Common Law is always good, notwithstanding the Statute, *unless the Statute contains an express clause of nullity*.'

"This," says Bishop, 'like most other principles of Law that may now be deemed to be well-settled, has struggled against some doubts, but it seems never to have been overruled, unless we except a decision in Massachusetts.'

"In support of the rule, he refers to decisions in Vermont, New Hampshire, New Jersey, Pennsylvania, North Carolina and Kentucky; and such is the rule in England, since the repeal of 26 *Geo.*, 2 *Ch.* 33, commonly called Lord Hardwicke's Act.

"The same rule is recognized in *Reeve's Domestic Relations*, page 196, and enforced in a note at page 199.

"There is scarcely any principle of Law better supported by the authorities than that which declares that a marriage not solemnized according to the provisions of the Statute, in the mere matter of form, is a valid marriage. It will be first noticed, that most of these Statutes impose a penalty upon the person assuming to join others in matrimony, who is not legally authorized, and that in other respects the Statutes are merely directory. Now, it is a principle both salutary and well-settled, that the official acts of a person not duly qualified, are valid as to third persons and the public, when the neglect of the qualification is punished by a mere penalty, and where the acts themselves are not in their nature void, or are not expressly made void by Statute.' 7 *Johns*, 554.

"The Statute of 26 *Geo.*, 2, renders the marriage illegal and void, if not solemnized according to the regulations prescribed by the Statute, but that Statute is not, and never has been, of force in this State. Before its enactment, and since its repeal, the decisions in England were, and have been, in accordance with the doctrine already indicated; that the decisions in England before the passage of the Act of 26 *Geo.* 2, *Ch.* 33, held marriages to be valid, though they were not solemnized strictly according to the Statutes, if there was no clause of nullity. *Rez. vs. Brampton*; 10 *East*, 232; 1 *Bl'k Com.*, 433.

"That such is now the rule in England, since the repeal of 26 *Geo.*, 2, see *The King vs. the Inhabitants of Birmingham*, 8 *Barn. & Cres.* 29; 15 *Eng. Com. Law Rep.* 24.

"This case arose in relation to the settlement of a pauper. The pauper, Luke Smith, was married to Elizabeth Bratt, the year 1826, by license, he then being a minor under age of twenty-one years, and having his father then living, who did not consent to his said marriage.

"It was objected that his marriage was void under the new marriage Act, *Stat.* 4 *Geo.* 4 C. 76, for want of the father's consent.

Askew vs. Dupree.

"The Statute points out the mode in which licenses are to be obtained, and the matters to be sworn to by the parties or one of them; and one of those matters, where either of the parties, not being a widower or widow, shall be under twenty-one years, is, that the consent of the person or persons, whose consent to such marriage is required under the provisions of the Act, has been obtained thereto.

"The Statute specifies who shall have power to consent—the father, if living, or the guardian, if there be one—and proceeds: 'and such consent is hereby required for the marriage of such party so under age, unless there be no person authorized to give such consent.'

"The Court of King's Bench, Lord Ch. J. Tenterden delivering the judgment, held the marriage to be valid, on the ground, that 'the language of the Statute is merely to require consent; it does not proceed to make the marriage void if solemnized without consent.'

"One of the most frequent forms," says Bishop on *Mar. and Div.*, Sec. 171, 'in which this question arises is, where certain persons are forbidden to solemnize the marriage, or those who are authorized are forbidden to exercise the authority in any other method than the one prescribed, and the violators of the Law are subject to punishment. The rule, that a marriage in disregard of such a penal prohibition is good, seems to be universally acknowledged.'

"Again, Sec. 178: 'There is no particular form of words essential to the solemnization of marriage, unless made so by Statute. It is sufficient if the proper person, as minister or Justice, be present, and cognizance of the mutual engagement of the parties to assume the marital relation. But if such person do not consent to act in his official capacity, and do not so act, though he be present, and witness their undertaking, it has no other effect than if witnessed by an unauthorized person. This defect would not, however, vitiate the marriage, unless the Statute contained an express clause nullifying all marriages not celebrated by such official person.'

"The Statute of New Jersey, in relation to marriages, declares, 'that every Justice of the Peace in that State, every 'stated and ordained Minister of the Gospel,' and every 'religious society according to its rules,' shall be empowered to solemnize marriage.'

"Justice Ford, in commenting upon this Statute in *Pearson v. Howey*, 6 *Halstead*, 20, said: 'Suppose this Act had gone to the whole extent of declaring that *no other person or persons* should solemnize marriages, except those mentioned in it, such persons would commit an offence against the Act by solemnizing marriages, for which they might be punished, but still, the marriage contract between the parties themselves would remain valid. During the Commonwealth of England, Parliament passed a law *requiring* all marriages to be solemnized by Justices of the Peace; yet, a marriage solemnized by a clergyman was holden by all their Courts to be valid, as between the parties, though the Statute prohibited such priest from doing it; and for the act he was exposed to punishment. Our Act empowers an ordained Minister of the Gospel to solemnize marriages; but suppose a Minister of the Gospel should do it before he is ordained, can any person believe that the marriage itself would be invalid, and that either of the parties might go away at any time afterwards and contract a new alliance? Our Statute prohibits Ministers of the Gospel from solemnizing the marriage of persons under age, without the consent of parents or guardians, under a very heavy penalty; but this does not render the marriage void; on the contrary, it remains sacred and inviolate, which is the very thing that aggravates the offence.'

"2 *Kent*, 91: Such 'is the doctrine judicially declared in New Hampshire, Pennsylvania, and Kentucky, and by Statute in Alabama and Vermont; and the marriage is held valid as to the parties, though it be not solemnized in form according to the requisitions of their Statute Law.'

"This doctrine has been virtually recognized by the Supreme Court of this State, in the case of *Park et al. vs. Barron*, 20 *Geo.*, 702—Judge McDonald delivering the opinion.

"It is conceded that the precise point before the Court in that case, and adjudicated by it, is not identical with the question now under consideration, but the Judge who delivered the opinion of the Court recognized the general principle which has now been laid down.

"The facts of that case were these: James Barron intermarried, and was divorced from his first wife at her instance, he being the 'guilty party.' He afterwards married again,

Askew vs. Dupree.

his first wife being still alive ; by both he had children ; after his death, his children were entitled to a distributive share of the estate of A. Barron, a brother of James Barron, who died without issue after James Barron died. The contest was between the children of James Barron by his first wife, and those by his second. The issue of the first marriage claimed the whole distributive share which would have gone to their father, had he been living, contending that the second marriage was void, and the issue thereof bastards.

"James Barron having been the party whose improper or criminal conduct authorized the divorce, was prohibited from marrying by the Act of the General Assembly of 1806, during the life of the woman from whom he had been divorced. By marrying the second time, he subjected himself to the pains and penalties against bigamy ; but the second marriage is not declared by that Act to be void, but is made indictable and punishable. The Court held the issue of the second marriage legitimate, and entitled to take, representing their father.

"It is only necessary to refer to so much of the published opinion, as goes to sustain the general principles of Law under consideration.

"Barron, whose misconduct led to a divorce, was prohibited from marrying, under a penalty ; but the marriage is not declared void by the Act which prohibits him from marrying.

"The first marriage Act in England was 26 *Geo. 2d.* That Act was never in force in this country. It expressly provides that it shall not extend to marriages solemnized beyond seas. There is a marked difference between that Statute and our own as respects the solemnization of marriages. That Act not only inflicts a severe penalty on persons who solemnize marriages contrary to its provisions, but it also declares all marriages thus solemnized void. Our Statutes inflict a penalty, but do not declare the marriage void.

"Barron's marriage is the marriage of a person prohibited from marrying under a penalty, the Statute not declaring the marriage void. If it be not a good one, it should be classed according to the analogies of the English Law, with marriages that are voidable.

"Marriages within certain degrees of kindred are, in England, prohibited by both the Canon and Statute Law. They are, therefore, unlawful; and yet, they are not void, but voidable only. 1 *Eccl. Rep.*, 73. If not pronounced void in the life-time of the parties, they are valid to all civil purposes. *Id.* 168. If such marriages are prohibited by the Statute Law of England, why are not the parties who enter them in violation of the Law, indictable for committing an act forbidden by a public Law? The Common Law Courts, however, have never interfered, and have left such cases to the undisturbed jurisdiction of the Ecclesiastical Courts. If the Courts there abstain from taking cognizance of such cases, the Courts here may well say, that the public policy, to which the Courts have referred by declaring the contracts void, which are prohibited by inflicting statutory penalties on those who enter into them, whether the contracts are declared void or not, does not require the enforcement of that principle so as to set aside actual marriages, which the Legislature has not pronounced void. A public policy which looks to the protection of the innocent and unoffending, to the peace of families and the welfare of society, would seem to us to forbid the inference of a purpose on the part of the Legislature, which they have not expressed, that the marriage of a party against the prohibition of the Act of 1806 should be void."

"If this be the Law applicable to a marriage prohibited by Statute, but not made void by Statute—a *fortiori*—does it apply to a marriage not solemnized by either of the persons authorized to join persons in matrimony, if it be not rendered void by the Statute for want of that formality."

"It is true, that this rule of construction is different from that ordinarily applied to contracts, but it is required by considerations of public policy."

"For obvious reasons connected with the welfare of society, the Law is more tender of nuptial contracts than ordinary contracts, which relate merely to property and the ordinary dealings among men."

"Marriage contracts are, by the Common Law, excepted from the rules which govern ordinary contracts. 20 *Geo.*, 704."

"*Bish. on Mar. and Div.*, Sec., 170: 'It was admitted by Dr. Sushington, that the rule of interpretation we are con-

Askew vs. Dupree.

sidering is not in accordance with the constructions which some other acts, relating to other subjects have received; but it must always be remembered,' he said, 'that marriage is essentially distinguished from every other species of contract, whether of legislative or judicial determination; that this distinction has been universally admitted; that not only is all legal presumption in favor of the validity and against the nullity of marriage, but it is so on this principle, that a legislative enactment to annul a marriage *de facto*, is a penal enactment, not only penal to the parties, but highly penal to the innocent offspring, and therefore to be construed according to the acknowledged rule most strictly.'

"This indicates the reason for the rule, and it is one which has been already adverted to. It is founded upon public policy.

"After the marriage relation is entered into, it is then considered in the light of a civil institution, in which the State itself has an interest, as well as the parties. And the interest of the State is that these contracts shall be permanent, and not revocable at the will and pleasure of the parties; to prevent promiscuous concubinage between the sexes; that parents may be held responsible for the support, maintenance and education of their offspring, and that the legitimacy of their offspring may be known and established beyond dispute, and the offspring of a marriage should never be bastardized, except in cases in which the Law declares the marriage to be void *ab initio*.

"This being the rule that a marriage at Common Law is always good, notwithstanding the Statute, *unless the Statute contains an express clause of nullity*, it only remains to inquire, whether our Statute regulating marriages declares such a marriage as the one under consideration void for want of conformity to the Statute?

"The 6th Sec. of the 3d Art. of the Constitution of Georgia provides, that the Clerk of the Court of Ordinary may grant marriage licenses, and the Act of 1799, passed to carry that Section of the Constitution into effect, ~~states in~~ the 3d Section, that 'The Clerks of the Courts of Ordinary in the several counties shall grant marriage licenses ~~directly~~ to any Judge, Justice of the Superior Court, Justice of the Peace, or Minister of the Gospel, (and by a subsequent Statute to any Jewish Minister, or other person authoriz

Askew vs. Dupree.

to perform the marriage ceremony between Jews,) to join persons of lawful age, and authorized by Levitical degrees to be joined together in matrimony; and where such persons intending to marry shall have the banns of marriage published three times in some public place of worship, it shall be lawful for such Judge, Justice of the Superior Court, Justice of the Peace or Minister of the Gospel, being duly certified thereof, to marry the persons whose banns have been so published; and any person marrying any couple without such license, or publication of such banns, shall forfeit \$500 to be recovered for the use of the Academy of the county, by action of Debt in any Court having cognizance thereof, in the name of the Commissioners of such Academy.' *Cobb's Dig.*, 282.

"The 28th Section of the Penal Code enacts, that 'If any Minister of the Gospel, Judge, Justice of the Superior Court, or Justice of the Peace, shall join together in matrimony any man and woman without a license, or publication of banns, as provided by law, or where either of the parties within his own knowledge shall be an idiot or lunatic, or subject to any other disability which would render such contract or marriage improper and void, such Minister, Judge, Justice of the Superior Court, or Justice of the Peace, shall be guilty of a misdemeanor, and on conviction, shall be fined in a sum not less than \$100 nor more than \$500, which said fine, when collected, shall be paid over to the Justices of the Inferior Court of the County where the offence was committed, for the use of the Poor School Fund of said County.' *Cobb's Dig.*, 818.

"These are all the Statutes which have been enacted by the Legislature of this State for the regulation of marriages. In neither is a marriage declared void, if not solemnized by a Judge, Justice of the Superior Court, Justice of the Peace or Minister of the Gospel—the only penalty imposed is upon the officer or Minister who may marry a couple without a license, or the publication of banns; no penalty is imposed upon an unauthorized person who may perform the marriage ceremony, but the penalty is for joining together in matrimony any man and woman without a license, or publication of banns, as provided by Law.. If Mr. Buckner was not a Minister at the time he performed the ceremony, but had a license authorizing James F. Dupree and Uriah E. Askew

Askew vs. Dupree.

to be joined together in matrimony, he is not liable to the penalty prescribed by the Statute. The object and intention of the Statute is to prevent clandestine marriages, and this object is effected by requiring the publication of banns or the issuing of marriage licenses; either gives publicity to the intended marriage; the publication of the banns does it effectually, and when a marriage license issues, any person interested has a right to know the fact from the Ordinary; for his official acts are not a matter of secrecy. But our Statute does not say that a clandestine marriage shall be void; but it only imposes a penalty upon those who may celebrate marriages without the requisites which are necessary to give them publicity.

"If marriage be a civil contract, consummated by the consent of the parties, freely and voluntarily given, the bare fact of its being clandestine, and being entered into and solemnized without the usual requisites to give it publicity, does not *ipso facto* render it void, in the absence of any statutory provision to that effect.

"The advantage," says Ch. J. Woodbury, in 2 *New Hamp.*, 277, 'of an open and notorious solemnization of the marriage contract is no doubt advantageous to the interest of society, and it was for the purpose of giving it a greater degree of notoriety, that these Statutes were enacted; but even without these forms, for they are nothing more, where a contract which changes so thoroughly the relations of the parties to the community, is first executed by them with deliberation, and afterwards consummated by cohabitation, it should not be lightly endangered, and everything done disannulled.'

"So in Kentucky, where a Statute prohibited the celebration of marriage without a license, the marriage was held to be valid, though no license was taken out.

"*Cannon vs. Alsbury*, 1 *A. K. Marshall*, 76.

"From the premises which have been laid down, the conclusion is inevitable.

"In every aspect in which the case before the Court can be considered in relation to our Statutes regulating marriages, under long-established rules of Law, and enforcing a public policy which regards the welfare of society and the peace of families, the marriage of the complainants, James F. Dupree and Uriah E. Askew, must be held to be valid and binding."

I would merely add, that it would constitute an act of unpardonable pendency to attempt any further review of the authorities upon this question. The Law of the case has been exhausted by *Bishop on Marriage and Divorce* and other text-writers, and in the adjudicated cases in England and this country.

See *Dalrymple vs. Dalrymple*, 4 *Engl. Eco. Rep.*, 485 ; *The Queen vs. Millis*, 10 *Clark & Finnelly*, 534 ; 6 *Hallett's N. J. Rep.*, 12 ; 2 *New H. Rep.*, 268 ; 4 *Johns*, 52 ; 1 *Hill N. Y. Rep.*, 270 ; 8 *Paige*, 574 ; 4 *Const.*, 230 ; 6 *Bian*, 405 ; *A. K. Marsh.*, 368 ; 2 *Vermont*, 157 ; 12 *Ib.* 396 ; 20 *Ib.*, 382 ; 1 *Yerg.* 177 ; 2 *Ib.*, 59 ; 6 *Ala.*, 765 ; 1 *Har. & McH.*, 152 ; 2 *Cal. Rep.*, 503 ; 1 *Louisiana*, 68 ; 4 *Ib.*, 347 ; 6 *Ib.*, 463.

I would remark that the case in 10 *Clark & Finnelly* occupies 374 pages of the volume !

The conclusions to be deduced from the whole matter are these : That marriage is founded in the law of nature, and is anterior to all human law ; that in society it is a civil contract ; that if the contract is *per verba de presenti*—that is, I take you to be my wife, and I take you to be my husband—though it be not consummated by cohabitation, or if it be made *per verba de futuro*, and be consummated, it amounts to a valid marriage, in the absence of all municipal regulations to the contrary ; and that notwithstanding there be Statutes directing a license to issue, as in this State, and inflicting a penalty on any minister or magistrate who shall unite the parties in wedlock, without such license, yet, in the absence of any positive enactment, declaring that all marriages not celebrated in the prescribed form, shall be void ; a marriage deliberately and intentionally entered into by the parties, who are able to contract according to the rules of the Common Law, without conforming to the enactment, is still a valid marriage.

And this is the opinion of Chancellor Kent, 2 *Com.*, 90–91 *Judge Reeve, Dom. Rel.*, 2 *9d.* 1857, note page 199, and *Prof. Greenleaf*, 2 *Ev.* 513, and notes.

In Massachusetts it is provided by Statute, that no persons but Justices of the Peace and Ministers of the Gospel shall solemnize marriages ; and they only in certain specified cases. And in *Milford & Worcester*, 7 *Mass. Rep.*, 48, it was held, that the parties themselves were precluded from

Askew vs. Dupree.

solemnizing their own marriage, and that a marriage by mutual agreement, not according to the Statute, was void.

But this opinion, evidently a departure from the general doctrine, and distasteful to the public sentiment, was overruled in the subsequent case of *Parben vs. Harvey*, 1 *Grey's Rep.*, 119.

For the policy of this Law we are not responsible. It is for the Legislature to change it, should it see fit to do so. In this State, no marriage, within our knowledge, has been declared a nullity because the statutory regulations were not complied with, and while the Law inflicts penalties upon the celebrator, it has cautiously abstained from interfering with the marriage itself.

For myself, I approve the Law as it is. True, it will be sometimes abused. What human institution is not? Rarely, however, will the parties forego the benefits resulting from a compliance with the Statute. It adds so much both to the respectability as well as the security of the contract.

I have never known of a self-solemnized marriage. But suppose such should occur: better, far, for the parties, especially the female, that the Law should be as it is. Her honor is saved, and this is worth more than everything, even life itself. All other contracts may be rescinded, and the parties restored to their former condition; marriage cannot be undone.

Why does the Law, in utter disregard of what seems to be the usual protection and restraint, thrown around the inexperience and imprudence of infancy, allow infants—the male at fourteen and the female at twelve—to enter into the binding contract of marriage? It is at this age the sexual passions are usually developed, and the Law, with a wise forethought, looking beyond exceptional cases, and to the general interests of society, to guard against the manifold evils which would result from illicit intercourse, declares even infants capable of forming this relation.

The greatest amount of domestic discontent and discord I have ever known, was produced by a marriage celebrated under a license, regularly issued, and by an officiating magistrate duly authorized to perform the ceremony.

But, I repeat, let our rulers take action upon this most difficult and delicate subject, if, in their judgment, the good of the community demands it. It is a disgrace to the civilization of the age to condemn Courts for the real or imaginary defects of the Law.

LUCAS *et al.* vs. LUCAS.

1. That relief will be granted from a mistake as to the legal effect of an instrument, is law, settled by adjudications of this Court and by Statute.
2. The evidence shows such a mistake in the verdict in this case.
3. A motion to set aside a verdict and reinstate the case, is equivalent to a motion for a new trial, and is a proper remedy for a mistake in the verdict.
4. The nominated executor and propounder of a Will is a legal party on behalf of the legatees, to conduct the litigation involved in a *caveat* to the Will, from the beginning to a final adjudication.

Motion to set aside verdict, &c. Decision by Judge CABANISS, at the August Term, 1859, of Monroe Superior Court.

This motion was predicated upon an alleged misunderstanding and mistake as to the terms and effects of an agreement made by the parties and their attorneys, to settle and terminate the litigation and controversy which had been long pending, relative to the estate and wills, or papers propounded as wills, of the late Littleberry Lucas, deceased.

The agreement and consent sent up were as follows:

<p>"JAMES M. PARSONS and WIFE, "ELZA HALSTEIN and WIFE, and "PEGGY LUCAS, propounders, <i>vs.</i> "CINCINNATUS M. LUCAS, caveator.</p>	}	<p>Caveat, in Monroe Superior Court. On Appeal.</p>
<p>"CINCINNATUS M. LUCAS, propounder, <i>vs.</i> "JAMES M. PARSONS and WIFE, "ELZA HALSTEIN and WIFE, and "PEGGY LUCAS, caveators.</p>	}	<p>Caveat, in Monroe Superior Court. On Appeal.</p>

"It is hereby agreed by the parties to the above stated cases, that C. M. Lucas shall qualify as executor on that portion of the Will of 1845, set up by the verdict of the Jury, to-wit: a part of the 14th item of said Will, and that his qualification shall only extend to the property, to-wit: the land and negroes specified in said part of said item of said Will, and shall not include any increase of said negroes born since the execution of said Will.

Lucas et al. vs. Lucas.

"It is further agreed that Mrs. Peggy Lucas, C. M. Lucas and James M. Parsons shall, or may qualify as administrators on the balance of the estate of Littleberry Lucas, to-wit: all of said estate not included in the foregoing and first item of this agreement, and that neither or all of them will charge for commissions or services as administrators and administratrix.

"It is further agreed that any advancement made by Littleberry Lucas in his life-time to either or any of his children shall be estimated in the division of said estate, and that the negroes that have been received from said Littleberry Lucas by either or any of his children, shall and may be kept by those to whom they have been respectively loaned, but that the same, together with their increase, shall be appraised with the balance of said estate, and counted and estimated in the division of the same.

"It is further agreed that all of said estate, excepting what is specified in said first item of this agreement, including all the increase of said negroes in said item mentioned since the execution of said Will, shall be equally divided between Mrs. Peggy Lucas, the wife, and the three children of said Littleberry, having reference always in said division to the third item of this agreement.

"It is further agreed that the costs of both of said cases, including witnesses' costs and all cost in the Court of, Ordinary, the Superior Court and Supreme Court, which have been paid by either party, or remains to be paid, shall be paid out of said estate.

"It is further agreed that the respective parties litigant shall be reimbursed out of said estate the sum of five thousand dollars for counsel fees.

"It is further agreed that this agreement be entered on the Minutes of the Court for the convenient reference of all parties interested."

[Signed by the attorneys for plaintiffs and defendant.]

Appended to the agreement is the 14th item of the Will.

The following is the verdict taken and entered under the foregoing agreement, after stating the cases as first above stated, viz:

"We, the Jury, find that the 14th item of the Will of July, 1845, in favor of James T. Lucas, Love P. Lucas, and La-

Fayette W. Lucas, as far as the same is bequeathed to them, the land and negroes specified in said item, and the appointment of Cincinnatus M. Lucas as executor to execute the said portion of said item, is the true last Will and testament of Littleberry Lucas, deceased, and we hereby set up the same, and set aside the balance of said Will. We further find that said Littleberry Lucas died intestate as to the balance of his estate.

(Signed)

"L. B. ALEXANDER, Foreman."

The alleged mistake was in this: That the agreement and verdict as entered into and rendered as above, in setting up the 14th item of the Will as to the land and negroes therein devised and bequeathed to the children of Cincinnatus Lucas, carried to, or vested in them the rents and profits of said land and negroes since the death of testator, whereas it was the intention of the attorneys representing Peggy Lucas, Parsons and Halstein to give the corpus; that is, the land and negroes, but not the rents and profits aforesaid, but that these should fall to the estate undisposed of, and be equally divided amongst the heirs at law.

Counsel for the plaintiffs in error in the Court below, in the progress of the case there, submitted this proposition as, or in evidence: "We propose to insert in the written agreement, or in the verdict, at the option of the other party, an item that the rent and hire of the lands and negroes shall be a part of the estate of L. Lucas, for division between his heirs, and that the motion to set aside be dismissed on that being done."

The following testimony was submitted:

W. POE said: On his arrival in Forsyth, we found the matter under consideration for a compromise; himself and Tripp were authorized by their clients to settle the case; Mr. Hill came in and joined us, and read some propositions. The first offer of negotiation was, the cavetor of the Will, 1845, offered \$20,000 in money, and the other party demanded the land and negroes bequeathed in the 14th item; Parsons said he did not like to allow that, it was too much, but would yield if we thought it best; renewed the negotiation, and informed Mr. Hill that we would yield to his proposition, and give land and negroes; the difficulty was as to

Lucas et al. vs. Lucas.

the manner of carrying out the agreement. It was first suggested to set up the Will of 1855, and in framing the verdict, would provide for vesting the land and negroes in the children of C. M. Lucas; Mr. Hill preferred another way; that the 14th item of the Will should be set up to the extent of land and negroes, and to declare an intestacy as to the balance of the property; witness stated it was a matter of form, but he had some feeling on the subject, and was opposed to setting up the old Will, as he had been fighting it so long, but yielded, as the Will of 1855 was but a declaration of the Statute of Distribution of the State of Georgia. Agreed that the land and negroes should be vested in the children in that way; the plan then was to frame the verdict to carry out the agreement, and Mr. Hill commenced writing it. Mr. Trippe not liking the way it was written, then took the paper and wrote the agreement now in Court, and Mr. Hill wrote the verdict; witness got the Will of 1845 and estimated the worth of the negroes and land from information, and said that caveators were giving more than he at first expected. Whilst doing this, Mr. Simmons asked what was to become of the crops which had been made on the land? witness replied, they would go with the estate and that was whilst Trippe and Hill were writing; witness' view was, that nothing was to go into the verdict but the land and negroes, and the object was, to carry out that view in the most compendious way. Whilst this was going on, Mr. Hill said he wanted the 14th item of the Will set up, and had an objection in it; the verdict and papers were read, and in the Court-house the verdict was signed by the Jury, and the agreement by the parties. Whilst the arrangement was being made, Mr. Trippe was interrupted by Dr. Burney, on business; witness' purpose was, to give the corpus of the land and negroes, and nothing more; did not express that purpose to Mr. Hill, except inferentially; hire and rent were not mentioned at all, except by Mr. S., and don't know that Mr. Hill heard him; Simmons was only counsel—not one of the referees; no counsel for propounder was present except Mr. Hill; the object of the agreement was to explain the verdict; the verdict was to embody the whole agreement, except the increase of the negroes, after the death of the testator was a matter of discussion.

R. P. TRIPPE said : That himself and Hill were together in the morning trying to settle the cases ; proposed to give him \$20,000 ; he wanted the land and negroes ; estimated the land and negroes at twenty-two thousand dollars ; was urged to accept that, as there was a small difference between the two propositions ; Mr. Hill stated there were special reasons why he wanted the land and negroes ; witness said that the difference of \$2,000 was but \$500 each for the parties ; it was a nominal sum ; proposed that the land and negroes should be estimated, and if Mr. L. was anxious for his children to have them, he could pay them the difference between that extent and the \$20,000 ; adjourned without coming to any agreement ; saw his client and he refused to accede to the agreement ; in the afternoon he and Mr. Poe took the responsibility to make a settlement, and would meet Mr. Hill ; told him they would give him the land and negroes. In the interview in the evening, witness first heard of the birth of negroes' children after the death of testator ; Mr. Hill said there were only a few : witness said he would not give another dollar ; the question then arose how it should be carried out ? Mr. Hill suggested that we would make an award, declaring an intestacy, and in the award give the children the land and negroes ; Mr. Poe suggested setting up the Will of 1855, and by agreement, give them the land and negroes ; Mr. Hill preferred setting up that part of the 14th item giving them the land and negroes, and witness consented on the ground that it would be best to set up that item, as it would bind all parties and be a mere formal execution of the agreement, and would more effectually bind the parties ; Mr. Poe said we were giving too much, and stated the estimated value of the property at the time ; Mr. Hill said two of the negroes were dead and two were worthless ; Mr. Poe's estimation was on 20 negroes, when Mr. Hill wanted the negroes born since the execution of the Will ; witness replied that they would not give one dollar more than was mentioned in that item of the Will, adding what was allowed as counsel fees to C. M. Lucas ; witness called attention to the amount which was yielded to him ; proposed to give the corpus of the land and negroes, and nothing more ; thought it was stated a number of times that we were to give nothing more ; if it had been claimed, would not have yielded it ; we intended to draw the agreement to carry out this purpose—that is, to convey no-

Lucas et al. vs. Lucas.

thing but the land and negroes, without the increase of the negroes, rents and profits; that was the intention of witness and all parties, so far as witness knew; rents and profits were not mentioned by name, but that was the intention; the idea of rents, issues and profits did not occur formally; when the two little negroes were mentioned, witness said he would yield nothing more than the land and negroes mentioned in the Will; were not authorized to give that much, but would take the responsibility of doing it; not exceeding five minutes after the agreement was signed, witness took Mr. Hill aside and asked him if the rents and profits would be claimed, and he said the point probably would not be raised, but that Mr. Hill said it was a construction of law; Mr. Hill had already raised the point; witness asked then that an agreement should be put down as they understood it, and that he should call on Mr. Lucas and let it be known what they were to do; went instantly to Mr. Poe and gave notice to the Clerk not to record the verdict; called the attention of the Court to it, and sent for Mr. Hill; witness had no authority to go any further than giving the corpus of the land and negroes; Mr. Hill claimed, as the basis of his negotiation, that the 14th item of the Will should be set up; did not understand him to say that he would not come to any other agreement; his proposition was, to set up the 14th item; \$10,000 was to be paid out of the estate for counsel fees—\$5,000 on each side, and C. M. Lucas was to be executor of that part of the Will set up, and an intestacy declared as to the balance of the estate; and the reason assigned by Mr. Hill was, that the testator intended the land for the boys'; always understood it to be his Will, and so Mr. Hill claimed; the first proposition was, to set up the 14th item. In the afternoon Mr. Trippe came to Mr. Hill and said that he had got his client willing to do what he and Mr. Poe would say; went to Mr. Trippe's room; Mr. Hill suggested to get an order of Court appointing them arbitrators, and that their award be made the judgment of the Court; Mr. Poe wanted the Will of 1855 set up; Mr. Trippe suggested a verdict, setting up that part of the Will of 1855 giving the land and negroes to the boys, with an agreement explaining it; Mr. Hill said, don't let us have any agreement but a verdict; the verdict was read first to M. Poe, and afterwards in the hearing of all; Mr. Trippe suggested an alteration, and made an interlineation. After

coming into the Court-house, an interlineation was made by Mr. Trippe; agreed upon the verdict; Mr. Trippe read it to the Jury, and it was signed; during all the time of the negotiation, the rents, issues and profits were not mentioned by Mr. Trippe, or in his hearing; while writing the agreement, Mr. Hill was taunting witness about writing so long an agreement; the object was, to cover everything, and to give only *the corpus*.

T. J. SIMMONS corroborates the testimony of Messrs. Poe and Trippe, so far as the conversation in Trippe's office; intended to give the land and negroes estimated at \$22,000 or \$23,000; did not know that anything more would be claimed, until it was mentioned after the verdict; nothing was said about rents and profits; witness mentioned the crops to Mr. Poe; Mr. Hill objected to the increase of the negroes being excluded, and said if Dr. Parsons claimed them, he would pay one-half; finally agreed to the little negroes, because it was a small amount; Mr. Trippe positively refused to yield anything but the land and negroes.

Defendant's evidence.

In relation to the settlement of the issues to the Will of Littleberry Lucas, deceased, B. H. HILL said: During the argument of the case before the Supreme Court, His Honor Judge Lumpkin asked why the case could not be settled, as C. M. Lucas had offered to surrender the notes and money for division, and the accumulation of these formed the pretence for the necessity of making the new Will, or something to this effect. As counsel for C. M. Lucas, I immediately replied, I was ready to make that settlement. A few weeks ago, I received intimation that the propounders of the Will of 1855 were willing to pay the children of C. M. Lucas' legacies, under the Will of 1845, the sum of \$20,000, and allow certain counsel fees and costs to be paid out of the coming and, and divide the balance. I replied that I thought the case was one which ought to be settled, and that I was willing to settle on principle; and that while I thought the money and notes ought to be divided, I also thought the specific legacies in the Will of 1845 to C. M. Lucas' children ought to be set up. When I arrived here in Forsyth, I learned the case was referred to me for settlement in behalf of Lucas,

and to Col. Trippe on the other side. On Monday morning, I called on Col. Trippe, and, in the first place, asked him if he had plenary power to settle the cases? He replied, he did not, but had restricted power, and that he could only settle on the terms above mentioned. I told Col. Trippe that I was authorized to settle, but I was unwilling to settle except on principles of right, as I conceived them, and that I thought the notes and money ought to be divided, and that as much should be applied out of the estate to pay the counsel fees of C. M. Lucas as the fees of the other side ought to have amounted to; that I thought the whole of the 14th item of the Will of 1845 ought to be set up and distinctly stated, for the reasons then given; that whatever the children of C. M. Lucas received, must be received as a specific legacy, without being subject to appraisal under the Will of 1845. (As to what was said on the question of advancement, need not be mentioned, as it is not involved.) Remarks were then made as to the value of the land and negroes, and by estimating the land at \$10,000 and the negroes at about \$700 per head, we thought the value would be \$22,000 or \$23,000, and the other items mentioned in the 14th item of said Will would increase it a few thousand. Col. Trippe asked me if I thought the increase of the negroes passed under the Will? I replied that I thought the increase, prior to the death of the testator, did not pass. Mr. Trippe had an interview with Mr. Parsons, who happened in, and on returning, said to me he was positively prohibited from doing more than he had proposed. I told him I thought he could inform his client of the nature of my position, and at least get their views on it. He said he did not see why they should seriously object to acceding to my proposition, as far as the land and negroes were concerned, but he did not think they could be brought to agree to the balance of the 14th item. I said I might give up \$1,000 for ditching, &c., but that I doubted whether I would yield any other point, but at all events, see his clients and see what they would do; I made my proposition, and now wanted to hear from his side. About 10 o'clock Col. Trippe called at my room and said he could do nothing with them men, or they would do nothing more, and I replied, Very well, and Col. Trippe immediately left. I informed Mr. Lucas of the result, and he expressed himself satisfied, and the case could go on. After I came into Court-house, Col.

Trippe came and took me out and said his clients had finally agreed to do anything he and Mr. Poe should agree to. I asked him what he thought he and Mr. Poe would agree to? He said he thought they would give us the land and negroes under the 14th item, but as I was of opinion that the increase of the negroes did not legally pass under the Will, I must agree to so express it. I told him I thought the increase before the death of the testator did not pass, but the increase after his death did pass, as the Will took effect at his death, and I thought the Will ought to have its legal effect. He said his client would not agree to it, and the increase of the negroes must be excepted. I told him to go and get Mr. Poe, and we would go to his office and see if he could draw up an agreement that would suit us. When we got to Col. *Trippe's* office, we discussed as to the best method of having the agreement effectively carried out. I suggested that we enter into an agreement stating the terms of the settlement, and then, by an order of the Court, have the whole matter referred to our discretionary arbitrament, and then we could make our agreement our award, and return it at once as the judgment of the Court. Col. *Trippe* suggested, that as to the portion of the Will of 1845, which was to be set up, the better plan might be to take a verdict, and that the other application might be dismissed, and the other points about costs, lawyers' fees, increase of negroes, &c., could be embodied in an agreement. Col. Poe agreed with Col. *Trippe*, and I at once agreed to the plan; whereupon, I commenced to draw an agreement, and drew the first item, which Col. *Trippe* said ought not to be in the agreement, as it would be covered by the verdict, and it was, but not to specify in writing that we agreed to a verdict, &c. I assented, and commenced to write the next item. He said that was also covered by the verdict. I then said I did not really see that it was necessary to have any written agreement, but let us write a verdict and settle all by the verdict. Col. *Trippe* preferred an agreement for explicitness on some points. He then commenced and drew the agreement, and I drew the verdict. I read the verdict, and Mr. Poe assented to it. Col. *Trippe*, after finishing the agreement, took the verdict and read it, and suggested the alteration appearing by the first interlineation, and which was at once assented to as not altering the meaning. Col. *Trippe* then read the agreement he had drawn, and I

objected to the portion excluding from the effect of the Will the increase of the negroes born after the death of the testator, and said I surely could not think his client would insist on it; that he ought to leave them to pass by the usual construction of the Will, and that if his client really, after understanding it, insisted on taking these infants, to write me the fact, and I would pay half their value myself. Col. Trippe said the infants would not be taken away, but that C. M. Lucas could pay for them in the division and let the boys have them. I then said it was a small matter any way, and though I thought it was wrong, I would let it go and agree to the agreement as it stood. But the verdict and agreement were then assented to, and, by agreement, it was to be entered on the Minutes of the Court for reference, and I added that to the agreement at Col. Trippe's suggestion, and it was read and agreed to. We came on to the Court-house, and I showed the verdict agreed on to my associate counsel, Col. Hunter, suggested the additional words of the second interlineation, and set aside the balance of said Will. Col. Hunter suggested that we add, and we set aside the Will of 1855. Col. Trippe said this was unnecessary, as an intestacy was declared, and it would not alter it to add those words, and he would object to it, and said we ought to be satisfied with it as it stood. I thought so too, and said to Col. Hunter, that I did not think the words suggested at all necessary. The Court was informed that we had agreed on a verdict, and asked for a Jury. The first twelve were ordered down, and Col. Trippe read the verdict to the Jury, and it was signed and handed to the Clerk. At no time during the negotiation was the question of hire and rent mentioned, either by Mr. Poe or Col. Trippe, or myself. I will add, the verdict is precisely as it was agreed on: nothing is inserted which ought to be omitted, and nothing is omitted which was to be inserted; if the hire and rent are to go to the estate, and not the legatees, the place to insert it is the agreement, and not the verdict; there was certainly no intention to limit the effect of the verdict in the verdict itself, but that was to be set up in the 14th item as it now expresses it, &c.

Cross-examination of Mr. Hill by Movants.

Mr. T. said they would give the negroes mentioned in the 14th item; when they disagreed before dinner, the difference

Lucas et al. vs. Lucas.

was \$1,000; in the morning estimated the negroes at about 14,000; the land at \$8,000; told Mr. T. to see his client and see if he would give the land and negroes; nothing was said about corpus rents and profits; witness has no doubt the object of Mr. T., in making up the sum to pay the difference between \$20,000 and \$22,000, was to give a specific sum for the purpose of making the settlement; when talking about the infant negroes, Mr. Trippe said he would not give one dollar more than he had proposed; if a proposition had been made to exclude the profits of the land and negroes, witness would have objected, but can't say but he might have yielded; can't say but he might have thought of the rents and profits at some time during the negotiation; think they would not have included the rents and profits, if it had occurred. When that part of Mr. Hill's written testimony was read, in which he stated that Mr. Trippe said he thought they would give the negroes and land under the 14th item, he was asked by Mr. Trippe if he said, "under the 14th item," or, "the land and negroes mentioned in the 14th item?" and Mr. Hill replied, "the expression was, the land and negroes mentioned in the 14th item."

After hearing said testimony, the Court refused to grant said motion, and overruled the same, on the ground that the Court have no right to correct the alleged mistake or to entertain jurisdiction of the question in the form of proceeding. To which counsel for movants excepted, and counsel for movants, on this the 16th day of November, 1859, (being within thirty days from the adjournment of said Term of said Court,) tender their bill of exceptions, and say the Court erred in refusing to grant said motion, and in overruling the same. And as the facts do not appear on record, the movants pray that this foregoing may be signed and certified as their bill of exceptions in our case, according to the provisions of the Statute in such cases made and provided.

R. P. TRIPPE,
Movant's Att'y.

TRIPPE & POE, for plaintiffs in error.

B. H. HILL, *contra*.

By the Court—STEPHENS, J., delivering the opinion.

Lucas et al. vs. Lucas.

Littleberry Lucas died, leaving two Wills—one executed in 1845, and the other in 1855. Cincinnatus Lucas, the defendant in error, being the nominated executor of the older Will, propounded it for probate, and the plaintiffs in error propounded the other, each party entering a *caveat* against the probate proposed by the other party. When the two cases thus made stood for trial on the appeal, the parties, through certain of their counsel, Mr. Hill for the defendant in error, and Messrs. Trippe & Poe for the plaintiffs, entered into a negotiation for a settlement of the whole litigation. The negotiation resulted in the taking of an agreed verdict, accompanied by an explanatory paper, the verdict written by Mr. Hill, and the explanatory paper by Mr. Trippe. Within a few minutes after the verdict had been taken, the plaintiffs moved to set it aside on the ground that, by their mistake of its legal effect, the verdict, with the explanatory paper, had been so framed as not to carry out the true settlement to which they had agreed. The defendant met this motion with four objections: First, that the ground on which it is founded is not good in Law, if true in fact. Second, that it is not true in fact. Third, that the proper remedy is not a motion to set aside the verdict, but a bill to reform the agreement on which the verdict is founded. Fourth, that the minor children of Cincinnatus Lucas have an interest in the verdict, and are not legally represented before the Court. The presiding Judge sustained the third objection, and overruled the motion. We think all of the objections are bad, and that the motion ought to have been granted.

1. The principle of granting relief from a mistake as to the legal effect of an instrument, is established by repeated adjudications of this Court, and also by Statute. An Act of 1858, (*see Acts of that year, p. 74.*) in attempting to do several things, does accomplish this: it converts into Statutes, from the time of its passage, all such decisions of this Court as had been made before its passage, with the concurrence of a full Bench. Now, the case of *Wyche and wife vs. Greene*, in 11 *Ga. Rep.*, 159, and again in 16 *Ga. Rep.*, 49, had been decided by a unanimous full Bench long before the passage of that Act; and the very point decided in it, is the principle in question. In that case, a man made a deed of gift to his married daughter and "her issue," intending to give her an estate for life with remainder to her children,

and supposing that the words he had used would have that legal effect. The legal effect of the instrument was, of course, to vest the whole estate immediately in the husband of the woman; but the Court held that it ought to be so reformed as to carry out the true intention of giving to her for life, with remainder to her children. The principle is, that where there is a difference between the legal effect produced by the words, and the effect intended to be produced by them, the words, with their mistaken effect, shall yield, and the true intention shall prevail.

2. Did the parties mistake the legal effect of the verdict in this case? The verdict sets up as a *will*, a part of the 14th item of the Will of 1845, giving certain land and negroes to the children of Cincinnati Lucas, and then declares an intestacy as to the rest of the estate. This gives the land and negroes *as the Will* gives them; that is, from the time of the testator's death, with the natural increase of the negroes from that time, and with eight thousand dollars of rent and hire which had accrued between that time and the time of the settlement. The explanatory paper excepts the natural increase of the negroes from this effect of the verdict, but is silent as to the rent and hire. The verdict, therefore, gives the Lucas children the land and negroes named in that part of the Will which is set up, together with the rent and hire. Now, we think it is perfectly clear that the settlement which was *intended* to be carried out by this verdict, gives these children only the land and negroes as they stood at the time of the settlement, without any precedent rent or hire. The history of the negotiation, as given by all three of the negotiations, proves this beyond all doubt. Mr. Trippe opened the negotiation by offering Mr. Hill a round sum of twenty thousand dollars for the Lucas children. Mr. Hill rejected the offer, and made a proposition of his own, which was very much discussed and finally accepted by the other side. The question, What was that proposition? covers the whole dispute. It is important to remark, that it covered the whole estate of which this rent and hire were a known part—giving a certain specified part to the Lucas children, and all the rest of it, without specification, to the heirs at Law. Under this proposition, there cannot be an absence of intention as to *any part* of the estate. Under it, the rent and hire were intended to go either to the Lucas children or

Lucas et al. vs. Lucas.

to the heirs at Law, and to the heirs at Law for lack of specification, unless *intended* to be included in the specification of what goes to the children. It is a division of a whole, consisting of many parts, by carrying certain parts over a line for one set of persons, and leaving the remainder for another set of persons. The intention is to divide the whole, and whatever is not intended to be carried over the line, is intended to be left. The only question, then, is, What was intended to be included in that part of Mr. Hill's proposition which was for the benefit of the Lucas children? He says the terms of his proposition were, that he would take the land and negroes *under* the 14th item of the Will of 1845. Now, the legal effect of these terms, in which he says he communicated his proposition, is undoubtedly to carry the land and negroes *as the Will* gives them; that is, from the time of the testator's death; but it is demonstrable from the discussion and treatment of this proposition by the negotiators, Mr. Hill included, that he himself did *not mean so*. They all discussed it, went into a valuation of it, and agreed to it, *as a proposition embracing only the land and negroes mentioned in the 14th item, as they stood at the time of the negotiation*. They valued the land and negroes at twenty-two thousand dollars, as they stood at the time, and they were valuing them *as embraced in the proposition*. They therefore treated and considered the proposition as embracing the land and negroes only as they stood at the time of the negotiation. This of itself is a conclusive view as to what both sides intended by the proposition. But again: When the valuation had been made, Mr. Hill urged the other side to accept his proposition, *because it exceeded theirs by only two thousand dollars*; that is to say, it embraced nothing but the land and negroes valued at twenty-two thousand dollars. The proposition, considered as embracing the corpus only of the land and negroes, did exceed the other by precisely two thousand dollars, and he, by telling them that it exceeded the other by no more than two thousand dollars, assured them that it embraced no more than the corpus of the land and negroes. If it had embraced the rent and hire, it would have exceeded the other proposition by, not two, but *seven thousand* dollars. The negotiators talked about it, estimated it, considered it, treated it and *agreed* to it as embracing *only the corpus of the land and negroes named in the 14th item of th*

Will of 1845, and as *not* embracing either the preceding natural increase of the negroes or the preceding rent and hire. Mr. Hill says it never occurred to him to get rent and hire. Messrs. Trippe & Poe say that they conceded the *corpus*, and *no more*. There is no conflict; the evidence is all one way, and it shows irrefragably that these negotiators arrived at an agreement to settle the whole estate by giving the Lucas children the corpus only of the lands and negroes. Did they afterwards depart from that agreement? It is true, they made a subsequent agreement as to the *mode* of carrying out the main one, but the subsequent agreement was only ancillary to the first, intended, not to vary it, but to *carry it out*. In the subsequent negotiation respecting the proper mode, Messrs. Trippe & Poe gave the strongest proof that they intended to sanction no departure from the agreement already made, and that they held the mode *subordinate* to the end. This verdict, as it now stands, was proposed as the best mode of carrying out the agreed settlement. After it had been discussed somewhat, they discovered that, in that form, it would carry the preceding natural increase of the negroes. Mr. Hill insisted that he should have the verdict in that form, with its *legal effect*, whatever that might be, but Messrs. Trippe & Poe promptly and peremptorily repudiated the idea of allowing any legal effect which should concede more than they had already agreed to. They said they would not concede a dollar more, and Mr. Hill yielded. They adhered, however, to the verdict, but prevented its legal operation on the preceding natural increase of the negroes, by a clause in the explanatory paper. This natural increase was small in value, and this incident in the negotiation shows at once how resolute Messrs. Trippe & Poe were, not to concede any more than they had already agreed to concede, and that they considered the natural increase of the negroes to be an enlarged demand on Mr. Hill's part. The departure which was about to be made from the agreement in respect to the natural increase of the negroes was seen and prevented. The departure which was made in respect to the rent and hire is *discovered now*, and ought to be corrected.

3. And this brings us to the remedy. There is no effort here to *reform* an agreement nor to *enforce* one. A bill in Equity would be necessary for that purpose. The Court, in this case, was simply asked to recall the aid which itself had

Lucas *et al.* vs. Lucas.

lent to the consummation of a mistake. It was asked to set aside its own verdict, because it was not truly an *agreed verdict*, as the Court supposed it to be when it was signed. Suppose the mistake in this verdict had been discovered before it was signed, and Messrs. Trippe & Poe—as they undoubtedly would have done—had objected to its being signed: would the Court have ordered it to be signed as an agreed verdict, over the protest of one of the parties to it? Surely not; and for the reason that it would not have been an agreed verdict, and would have had nothing to support it. And for the same reason, the Court ought to have recalled its own act in having it signed as an agreed verdict, when it was discovered to have had nothing to support it but a *mistake*. Suppose the verdict had contained *words* which one of the parties did not know were in it: It would not have been an agreed verdict, and would have been set aside immediately upon the discovery that it was not so. So when it contained an *idea* which one of the parties did not know was in its words, it was not an agreed verdict, and ought to have been set aside. This motion to set aside and reinstate was, in effect, a motion for a new trial, and gave the Court the same power over the verdict. When a new trial is moved within time, as this was, it is a form of proceeding under which the Court may inquire into any cause which shows that the verdict was obtained by fraud or mistake, or is without foundation to support it. The whole argument on the remedy in this case is embraced in the statement that this motion only asks the Court to set aside its own mistaken verdict, and does not ask the reformation or enforcement of any contract.

4. The children of Cincinnatus Lucas are not heirs at Law of Littleberry Lucas, and have no interest in this verdict, except as legatees under the Will of 1845. Of that Will, Mr. Cincinnatus Lucas, the defendant in error here, is the nominated executor and propounder, and the motion to set aside this verdict is but a part of the litigation involved in conducting the caveat to a final adjudication. We cannot doubt that the nominated executor and propounder of a Will is the legal party, in behalf of the Will and those who claim under it, to conduct the litigation of a caveat from the beginning to the end of the chapter. It was intimated that while he might litigate for the legatees, he could not bind them by his compromise. It is enough to say that our judgment in

this case does not bind them by his compromise, but turns them loose from it. We think the verdict ought to have been set aside, on condition that the defendant might prevent it by entering on the Minutes of the Court a renunciation of the rent and hire, which are carried by the terms of it as it now stands. We send the case back for it to take that course.

Judgment reversed.

MANN vs. WATERS.

1. On the trial of a Possessory Warrant, the Judge ought to adjudge the possession to the plaintiff, if the property has been *entired* away from him by the defendant, or if the property having been in his recent peaceably and legally acquired possession has gone out of it *without his consent*, and has gone into the possession of the defendant without legal authority.
2. The judgment on a former warrant between the same parties and covering the same property, is relevant to show that the plaintiff's former possession of which he has been deprived, was a "legally acquired one," when taken in connexion with proof that the property had been delivered to him in pursuance of the judgment.
3. Any limit which may have been put by such former judgment upon the time during which the possession was to continue, is irrelevant on this issue.

Possessory Warrant. Tried in Monroe county, at Chambers, on the 3d March, 1860, by Judge CABANISS.

This was a possessory warrant brought by the defendant in error against the plaintiff, for the recovery of certain negroes. The plaintiff introduced in evidence the judgments on two former possessory warrants adjudging these same negroes to her possession, and proved that the negroes were delivered to her by the officer in pursuance of those judgments, one of the judgments covering a portion of the negroes and the other covering the rest. She also proved that the ne-

groes had been in her possession for some time, up to the first Monday in January last, but had disappeared between that day and the next Wednesday. She showed by the Sheriff who executed the present warrant, that he found the negroes in possession of the defendant. She then closed. Before the plaintiff had opened her case, the defendant moved for a continuance, in order to get testimony that the judgments aforesaid, while adjudging the possession to the plaintiff, limited it to the 25th December last. The Court refused the continuance, holding the testimony to be irrelevant, and the defendant excepted; and this is the first assignment of error. When the plaintiff tendered the judgments on the two former warrants with the proceedings antecedent thereto, the defendant objected to them, on the ground—first, that they were not properly proven; and second, that they were not relevant to the issue. The Court required the papers to be proven, and they were then proven by a witness who testified that he saw them all executed as they purported to have been; but overruled the objection on the ground of irrelevancy, and the defendant excepted; and this is the second assignment of error. When the plaintiff had closed, the defendant introduced a bill of sale made to him by the plaintiff on the 6th January, 1859, covering the negroes in dispute, and proved the acknowledgments of the plaintiff during that year, that the negroes were to stay with her only till Christmas. In rebuttal, the plaintiff proved that defendant had agreed to let her have the negroes back whenever she might replace the purchase money, and that before Christmas she, through her agent, had tendered purchase money back to defendant, but he had refused to return the negroes to her.

Upon this testimony, the Judge adjudged the possession of the negroes to the plaintiff, and the defendant excepted; and this is the third assignment of error.

GEORGE T. BARTLETT and ROBERT P. TRIPPE, for plaintiff in error.

C. PREPLES, *contra*.

By the Court—STEPHENS, J., delivering the opinion.

1. The evidence in this case is sufficient to support two

clusions, either one of which required the Judge to adjudge the possession of these negroes as he did, to Mrs. Waters. One is, that the negroes being in her possession, were seized out of it by the defendant into his possession; and the other is, that the negroes having been in her recent and peaceably and legally acquired possession, had gone out of it without her consent, and had been taken possession of by Mann without any legal authority. Under the Statute relating Possessory Warrants, (*Cobb's Dig.*, 591,) there is no question as to title nor as to the right of possession; the sole question is as to the manner in which the possession has been obtained by the defendant. If it turns out to have been obtained, as in this case, in any of the several ways prohibited by the Statute, it must be restored to the person from whom it has been taken in such improper manner. The parties must be placed in *statu quo ante*, &c.

The relevancy of the former judgments in connexion with the proof that the negroes had been delivered by the defendant in pursuance of the judgments, was to show that her possession had been "legally acquired."

The continuance was properly refused, because the evidence to be got by it was irrelevant for the reason already stated.

Judgment affirmed.

Williams vs. Stewart.

WILLIAMS vs. STEWART.

1. The vendor's lien for the unpaid purchase money is good against the vendee, his heirs and devisees, executors and administrators, all volunteers and purchasers who had notice of the lien before paying the purchase money, and may be set up as a defense to a note given to the vendee by a purchaser of the land, where the same has been transferred as collateral security, provided the holder took it with full knowledge of all the outstanding equities between the parties.

Assumpsit, in Butts Superior Court. Tried before Judge CABANISS, at September Term, 1859.

This was an action by Levin J. Stewart against Theophilus Williams, on a promissory note given by Williams to one Richard L. Harvey, and held by plaintiff, as bearer. The note was dated 2d October, 1851, payable 25th December, 1858, for \$150.

The defense was, that the note was given by defendant to Harvey in part payment of a lot or tract of land purchased by defendant of Harvey; that Harvey had before purchased said land from one Dismukes. Failing to pay the purchase money, Dismukes asserted the vendor's lien, and to relieve the land from said lien, defendant had paid to Dismukes the balance of the purchase money due by Harvey, and which was equal to the amount of the note sued on; and it appeared that Stewart, when he traded for the note, had full knowledge of the above facts; that Harvey was insolvent, and had removed from or left the State.

The Court, amongst other things, charged the Jury, that if the defendant was aware of the incumbrance, the vendor's lien, when he purchased the land from Harvey, and gave his note in payment thereof, and took a warranty of title from Harvey, there was no fraud or deceit practiced upon him by Harvey, and he could not defeat a recovery on the note in this action by a plea of failure of consideration, but his remedy was against Harvey upon his warranty. If he had such notice, he took the land with a knowledge of the defect of the title, and must rely upon his warranty for indemnity.

The Jury found for the defendant, notwithstanding the aforesaid charge of the Court. Plaintiff moved for a new trial, on the ground that the verdict was contrary to evidence and Law, and the charge of the Court.

Williams vs. Stewart.

The presiding Judge granted the motion, set aside the verdict, and ordered a new trial, and defendant excepted.

D. N. MARTIN; G. J. GREENN, for plaintiff in error.

DOYAL & CAMPBELL, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The facts of this case are briefly these: Jesse Dismukes sold to Richard L. Harvey a tract of land, for which Harvey gave his note. Harvey sold the same land to Theophilus Williams, taking his note in payment. Williams' note was transferred to Levin J. Stewart by Harvey, who, as well as Williams, had knowledge of Dismukes' vendor's lien upon the land. Harvey made to Williams a warranty deed. This action is brought by Stewart to recover this note of Williams, who resists the payment upon the ground that the consideration has failed on account of the outstanding lien upon the land which has been decreed to be paid.

Upon this state of facts, the Court charged the Jury, that Williams must pay his note to Stewart and look to Harvey for indemnity upon the warranty in his deed. The Jury found for the defendant, and the Court granted a new trial, because the verdict was contrary to the charge of the Court. And to this decision Williams excepts.

We cannot concur with the Court in the view which it took of the Law of this case. Stewart is not an innocent holder of this note; on the contrary, the proof is ample that he took it merely as collateral security for money which he had paid for Harvey, and with full knowledge of all the equities subsisting between all the parties. He occupied precisely the same position that Harvey would, had the suit been brought by him; and in that event, it would not be pretended that Williams would be compelled to pay the note to Harvey and be driven to a cross-action against Harvey, who has left the country insolvent. But he might defend the note on account of the failure of consideration occasioned by the outstanding encumbrance, to-wit: the vendor's lien.

Our conclusion, therefore, is, that the verdict was in accordance with the Law and the evidence, and that the new trial ought not to have been granted.

Judgment reversed.

Pitts vs. Thrower.

PITTS vs. THROWER.

1. A bill in Equity is filed by B., as the trustee of S. P., a married woman, for the recovery of certain negroes. On the trial, no evidence is offered showing the appointment of a trustee, or the existence of a separate estate in the married woman, neither is the husband made a party. A verdict being had for the complainant, and motion made for new trial on these grounds: *Held*, that these objections came too late after a verdict on the merits; by not insisting on them before verdict, defendant is to be held as waiving them.
2. When the Court grants a new trial on the ground that the verdict is contrary to evidence, against the weight of evidence, against Law and the charge of the Court, this Court will reverse such judgment, granting the new trial whenever it appears from the record, that the verdict is not contrary to evidence, nor the weight of evidence, or against Law, although it may be against the charge of the Court, the charge itself being wrong.

In Equity, in Spalding Superior Court. Tried before Judge CABANISS, November Term, 1859.

This was a bill in Equity, brought by Sally Pitts, wife of Laban Pitts, by her trustee, and Alexander Kendrick and Bethena, his wife, against Thomas Thrower, for the recovery of an interest in certain negro slaves, &c., in the possession of said Thomas.

The bill alleges that complainants, Mrs. Pitts, and Mrs. Kendrick, are the children of Margaret F. Thrower, late deceased, by her first husband, ——— Williams, and that defendant is the son of said Margaret by her last husband, Jeremiah Thrower; that in the year 1808, Joseph White, the brother of said Margaret F., executed a bill of sale, conveying a negro woman named Member, and her increase, to said Margaret F. for life, remainder at her death to complainants and their sister Polly, (they being the three youngest children of said Margaret by her first husband, (and Thomas Thrower, the defendant; that said Margaret F. survived her husband Jeremiah, and continued in the possession of said negro woman and her increase, till her death, in 1850, when the life-estate terminated, and the remaindermen became entitled to the possession of said negroes. The bill further states, that defendant, since the death of said Margaret, has taken and held possession of all said negroes

claiming them absolutely in his own right, under a bequest thereof to him, in and by the last Will and Testament of said Margaret F., and he refuses to have said negroes partitioned amongst said remainder-men, or to account for their hire, &c.

To this bill defendant pleaded in bar, the receipts executed to him by complainants for the legacies bequeathed to them in and by the last Will and Testament of said Margaret F., and having received said legacies, they have recognized her title in and to said negroes, and her right to dispose of the same, and that complainants are thereby concluded from setting up any claim or interest in conflict with said Will.

The defendant also filed his answer to complainants' bill denying their right or title to said negroes, or any portion or share thereof, and alleges and insists that said negro girl, Member, at the time said bill of sale was executed, was the property of Jeremiah Thrower, the husband of said Margaret F., which negro he received from said Joseph White, in exchange for a negro given to his wife by her father, and that after said negro became the property of said Jeremiah, and the title had passed from Joseph White, he made said bill of sale, which, under such circumstances, conveyed no title to said Margaret and her children, but said negro and her children remained the property of said Jeremiah, the father of defendant, until his death.

Complainants met defendant's plea by alleging and charging, that the receipts given by them for their legacies, under the Will of said Margaret F., were obtained from them by the fraud of defendant, and in ignorance of their rights.

The case was tried upon the Bill, answer and proofs. After the charge of the Court, the Jury returned a verdict for complainants; whereupon, counsel for defendant moved for a new trial on the following grounds:

1st. Because the Court erred in permitting the complainants to give in evidence the sayings of David White, the father of Margaret F. Thrower.

2d. Because the Court erred in permitting complainants to give in evidence the sayings and declarations of Joseph White, made after he parted with the possession of the negroes.

3d. Because the Court erred in refusing to permit defend-

Pitts vs. Thrower.

ant to prove the sayings and declarations of Joseph White, made before the execution of the bill of sale under which complainant's claim.

4th. Because the Court erred in permitting complainants to give in evidence the sayings of Margaret F. Thrower.

5th. Because the Court erred in receiving the testimony of Eli Benson, the trustee of Mrs. Pitts.

6th. Because Laban Pitts, the husband of Sally Pitts, was not made a party to said bill.

7th. Because complainants introduced no evidence to shew title in the trustee of Sally Pitts.

8th and 9th. Because the verdict of the Jury was without any evidence to support it, and decidedly against the weight of evidence, against the Law and the charge of the Court.

10th and 11th. Because one of the Jury had formed and expressed an opinion before he heard the evidence, argument or charge of the Court, and which fact was unknown to the defendant at the time the Jury was selected or stricken.

12th. Because one of the Jurors who tried said cause, after the Jury was charged with the case, and instructed not to speak to any one about it, did, in violation of said order, converse with other persons than his fellow-Jurors about the case, and expressed a strong and decided opinion against the defendant.

13th. Because of the discovery of evidence since the trial material to the defense, and not before known.

The presiding Judge, after argument, and a very able and elaborate review of the grounds of the motion for a new trial, ordered the verdict to be set aside and granted a new trial, on the ground: That there was no evidence showing any title for the property in dispute in the trustee of Mrs. Pitts, and, in the absence of such proof, holding, that her husband ought to have been made a party complainant with her; and on the further ground, that the verdict was decidedly against the weight of evidence, and contrary to Law and the charge of the Court.

To which ruling and order counsel for complainants except, and assign the same as error.

GREEN, MARTIN, GIBSON and MOORE, for the plaintiffs in error.

Pitts vs. Thrower.

PEOPLES & CABANISS, FLOYD, ALFORD, *contra*.*By the Court.*—LYON, J., delivering the opinion.

Sally Pitts, by her trustee, Eli Benson, and Alexander Kendrick and his wife, Bethena, filed their bill in Spalding Superior Court against defendant, for the two one-fourths of certain negroes in the possession of defendant, with hire, &c. On the trial of the cause in the Court below, much evidence was had on both sides, and resulted in a verdict for the complainants. The defendant moved for a new trial on thirteen different grounds. The Court sustained the motion, and granted a new trial on three grounds: the two first of which apply only to the recovery in favor of Sally Pitts—the third to the whole recovery.

1. That complainant introduced no evidence to show title in the trustee of Sally Pitts.

2. Because Laban Pitts, the husband of Sally Pitts, was not made a party to the cause.

3. That the decree of the Jury is decidedly against the weight of the evidence, and contrary to Law and the charge of the Court.

After defendant had answered the bill on the merits, and a verdict was rendered by the Jury, it was too late to deny the character in which complainant sued.

If it was true, that there was no legally appointed trustee, or no separate estate in the wife, or if it was in any way necessary for the husband to be made a party, the defendant ought to have taken advantage of the same before the verdict. But by permitting the cause to proceed to verdict and final decree, he is to be considered as waiving such objections.

The verdict was on the merits of the title, and could not be affected by such defects. The decree, notwithstanding, could have been so shaped as to provide for and remedy all these difficulties, if the necessity existed.

2. The facts of this case are, that Jeremiah Thrower, the father of defendant, was sometime about the year 1802, on a visit to his wife's father, David White, in the State of Louisiana; while there, David White gave to him, for his wife Margaret, mother of defendant, and complainants, a negro. But when Thrower started on his return to his family in

Ross vs. Thrower.

Georgia, the negro kept out of his way, so that he came home, leaving her there. There is no evidence but that the gift was a parol one, and unaccompanied by delivery.

Sometime after Jeremiah's return, Joseph White, a brother of Mrs. Thrower, being about to visit the State of Louisiana, agreed with Margaret and Jeremiah, or with Margaret Thrower, to let them or her have two negroes, old and young Member, for the one David White had given Margaret in Louisiana; provided, old man David White would let him have that negro. What occurred between David and his son Joseph White, in respect to the negro, does not very clearly appear from the evidence. But very soon after his return to Georgia, Joseph White bought old Member back, and made and delivered to Margaret Thrower a bill of sale for young Member, conveying the negro to Margaret Thrower during her life, and at her death to be equally divided between her four youngest children—Polly, Sally and Bethane Williams, children by a former marriage, and Thomas Thrower, the defendant—stating when he made the Bill of Sale that David White directed him to make the Bill of Sale for this negro in this way. It does not appear that Jeremiah Thrower ever consented to this arrangement, but the evidence rather tends to satisfy me that he repudiated it entirely. The negroes in controversy are the natural descendants of the negro woman, young Member. Very soon after this transaction, Jeremiah Thrower left his family in Georgia and returned to Louisiana, and, subsequently, enlisted in the army as a soldier, and died some five or six years after he left his family, having never returned to them.

This Bill of Sale was dated in 1808, under it, Margaret Thrower held possession of Member and her increase from that day, down to her death in 1851, not as the property of her husband, Jeremiah Thrower, not as her absolute property, but as property in which she had only a life-estate, and which at her death would go to her four children as named in the Bill of Sale from Joseph White, as was abundantly proved, not only by the repeated admissions and declarations of herself and the defendant, but by his acquiescence in that title, from 1823, when he became of age, to the death of his mother, a period of near thirty years.

Under this state of facts the Jury returned a verdict for complainant, directing that the property should be divided

Pitts vs. Thrower.

into four equal parts, so that complainants should receive two one-fourths thereof.

The Court, on motion, set aside that verdict and ordered a new trial, on the ground that it was decidedly against the weight of the evidence, against Law, and contrary to the charge of the Court.

Ought the Court below to have disturbed this verdict on these grounds?

In passing upon these grounds, His Honor Judge OABERISS, evidently regarded the verdict, as depending for its support, almost exclusively on the evidence of the witness, Joseph Williams, and so the case has been mainly argued before us.

It is claimed by counsel for defendant, that this witness was entitled to no credit, on account of certain inconsistencies and contradictions that, they insist, appear from his evidence. He was examined by commission as many as four different times, and three sets of the interrogatories and answers are before this Court. The witness at the time of testifying was sixty-five years old, and he testifies to facts that occurred when he was a boy of 12 or 18 years old, and under the circumstances it would be strange indeed, and almost unnatural, if, in some of the long and sifting examinations to which he has been subjected, when his different answers are compared together, with themselves and with what he had written in reply to a fishing letter of the defendant, to him on this subject, previously to the commencement of any litigation, there should not be found some little inaccuracies and apparent inconsistencies. It is conceded on all hands that if the testimony of this witness is entitled to full credit, that then the verdict ought to stand. Before considering this evidence, let us consider the motion independently of it, that is, as if the testimony of Williams was entirely out of the way, and if the verdict can be maintained without this evidence, then it ought not to be disturbed by the Courts, whether the witness was entitled to credit or not.

Independently, then, of this evidence, and looking alone to the balance of the evidence had on the trial, such as the answer of defendant, his letters and the evidence of the other witnesses, it is well established that Margaret Thrower held the exclusive possession of these negroes, under the Bill of Sale, before referred to, from the time her husband left her,

Stitt vs. Thrower.

between the years of 1808 and 1812, during the balance of her life, claiming only a life-estate in them, and asserting all the time whenever and wherever she is heard from, in respect thereto, that at her death the negroes belonged, and were to go to, and be divided amongst her four youngest children, of whom complainants are two, and defendant a third. Such possession was not only inconsistent with a title in her husband's estate, or her son the defendant as his heir at Law, but was hostile and adverse to such or any other outstanding title to the negroes. The defendant himself was not only apprized of the character of this adverse holding by his mother, and acquiesced in it, but he expressly admitted that such was her title to these negroes. This evidence was altogether sufficient to enable the complainants to recover in the absence of all other proof. The defendant attempts to overcome the force of this evidence by showing that although, all this is true, yet the negro woman, young Member, was at, and previously to the date of the Bill of Sale, the property of his father, Jeremiah Thrower, and not the property of Joseph White, to convey in this way. That the marital rights of the husband had attached by his possession, and that it was his property. Admit that he established this fact conclusively, was it not at last a question for the Jury to determine, whether he should, after such a great lapse of time, be permitted to disturb a title so long conceded, and so fully acquiesced in by himself, with a full knowledge of all his rights and all the facts. But does the evidence establish the defence? Has it been shown that Joseph White made the Bill of Sale without a right to do so? Has not the possession and claim of title as asserted by complainant, been continued and acquiesced in sufficiently long by defendant to justify the Jury in their finding; the Jury having disregarded the traditional accounts given by the witnesses of the beginning of the title, and ought the Court to disturb the verdict, on the ground that it was decidedly against the weight of the evidence? We think not.

What are the facts as to the beginning of the title? Up to the time that Joseph White left old and young Member in the possession of Jeremiah and Margaret Thrower, between the year 1802 and 1808, on the understanding that they should have them for the negro in Louisiana, if David White would let him have her, there is not the slightest evidence

Pitts vs. Thrower.

that the gift from David White to Mrs. Thrower had been completed by a delivery. It does not follow that because the witnesses said David White had given, that every thing was done to constitute it a good gift. When a gift is proven by parol, every thing must be proven necessary to constitute the gift a good one. Then at the time of this provisional arrangement with Joseph White, neither Jeremiah Thrower or his wife, had any title to the negro in Louisiana: on the contrary, the negro belonged to David White to do with as he pleased, to surrender or retain. If he chose to let Joseph White take the negro, or her value in money, on the terms that he should convey young Member to Mrs. Thrower and her four children, he had the right to do so, and Joseph White was bound thereby; he could not avoid it. In such case no interest ever did or could vest in Jeremiah Thrower. It was immaterial whether he accepted the Bill of Sale or not. Under this view, Member did not vest in Jeremiah Thrower when David White gave to Joseph White money in place of the negro, because that money was given to and received by him on terms. Thus stands this case, and what other verdict could the Jury have rendered, that is, if the evidence of Joseph Williams is to be believed, and why should it not be? It is not in conflict with any other, nor is he contradicted or impeached, unless he does so himself. We think the rule by which the Court below tested the credibility of this witness was rather stringent. All the presumptions ought not to have been against his integrity. He was an old man, testifying to facts that occurred fifty years before. It was quite natural to suppose that his recollection would be imperfect; that that which on first examination would appear dim and uncertain, would become clear and more perfect, as his mind should be brought to bear more steadily on the circumstances of a far distant past. But notwithstanding the great time that had elapsed, the number and severity of his examinations, there is great consistency in the whole; true, there is some little inconsistency, and how could it be otherwise? That shows at least that the witness was not swearing to a well studied tale. Take his letter as written to defendant in reply to a fishing inquiry of defendant, written to him immediately after the death of his mother, to find out whether the witness knew any thing, and how much; take that as the basis, and Thrower himself admits so much to be

Mann v. Waters.

true in his letter to Wm. Williams, and how has he varied from it, materially in any of all his depositions? We think that his evidence was not so conflicting or contradictory as to discredit itself, and we hold that the credit to be given a witness is one for the Jury to judge of, and not the Court, and that their verdict should never be disturbed because the Court should differ with the Jury on the degree of credit to be given a witness, unless, at least, the verdict should depend entirely on the evidence of that witness, and the case a very clear and decided one.

In every view the judgment of the Court granting a new trial was erroneous, and must be reversed. The verdict was not only not decidedly against the weight of evidence, but it was well supported thereby; neither was it against Law: indeed, we do not see how the Jury could have done otherwise. Certainly no other verdict ought to have been allowed to stand.

Judgment reversed.

MANN vs. WATERS.

1. Notwithstanding the Court refuses to postpone a case to procure testimony which would be unobjectionable, still if the evidence, if in, could not affect the result of the case, the judgment will not be disturbed.
2. Can a party under the Possessory Warrant Act of 1821, institute proceedings to regain the possession of property which he has voluntarily placed in the custody of another? Query.

Possessory Warrant for Negroes. Heard before Judge CARANISS, at Forsyth, Monroe County, 3d March, 1860.

This was a Possessory Warrant issued by the Hon. E. G. CARANISS, Judge of the Superior Court of the Flint Circuit, at the instance of Sarah J. Waters against Americans V.

Mann vs. Waters.

Mann, to regain the possession of a negro woman Rose, and her children, Wyatt, Emma and Elizabeth, alleged to have been taken by fraud, violence or seduction, and without lawful warrant or authority from her possession by said Mann.

The warrant issued 25th February, 1860.

At the trial, before Judge CABANISS, defendant moved for a continuance or postponement to such time as the Judge thought reasonable, on the ground of the absence of a witness who had been subpoenaed, but failed to attend, and by whom defendant expected to prove that the judgments in former Possessory Warrant cases between these same parties, in relation to these same negroes, and which were in favor of plaintiff, Mrs. Waters, only awarded the possession of said negroes to her till 25th December, 1859. The Judge refused to continue or postpone, holding that said testimony was immaterial. To which decision defendant excepted.

Plaintiff first tendered in evidence the warrants, bonds and proceedings of two former trials between the parties, had about October, 1859, one by plaintiff against defendant for the children, Wyatt, Emma and Elizabeth; the other by defendant against plaintiff, for the woman Rose. To their admission in evidence, defendant objected: 1st. Because they were not properly proven or authenticated. 2d. Because they were irrelevant. The Court overruled the last ground, but sustained the first, and required the execution of the papers to be proved, which was done, and they were then received. To which ruling defendant also excepted.

The parties then submitted their evidence, from which it appeared that Mrs. Waters had had possession of the negroes from the death of her husband in 1854; that on the sixth January, 1859, she sold said negroes to defendant for \$1400, and executed a Bill of Sale for the same; that when the Bill of Sale was executed, defendant agreed that the negroes might remain with her till the next Christmas, and that she might have them if she paid him for them; that when she paid for the negroes she might have them. Afterwards, in October, 1859, upon defendant's being about to remove from Jasper County, where the parties resided, to Monroe County, these Possessory Warrants above referred to were taken out by the parties respectively, which resulted in judgments in favor of Mrs. Waters, and the negroes awarded and delivered to her. This was about the 1st November; about the last of

Mann vs. Waters.

December she tendered the money to defendant for the negroes, (\$1400) who refused to take it, saying they were worth \$3000. The negroes continued in Mrs. Waters' possession until the first week in January, 1860, when by some means that did not appear, they left, or were taken from her premises, in Jasper County, and were found in possession of the defendant, who resided in the county of Monroe. Therefore, she sued out this Possessory Warrant.

Judge CABANISS, after hearing the testimony, ordered and adjudged that the negroes be delivered to plaintiff, upon her giving the bond required by Law in such cases.

To which order and judgment counsel for defendant excepted.

R. P. TRIPPE, for plaintiff in error.

PEPLES & CABANISS, and LORTON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This was a proceeding under the Possessory Warrant Act of 1821, (*Cobb* 590,) at the instance of Sarah J. Waters against Americus V. Mann, to get the possession of a family of negroes.

It appears that Mrs. Waters had been in the possession of these negroes, except for a short time, from the death of her husband in 1834, down to 1859. In January of this latter year, Mann bought the negroes at \$1400, and took a Bill of Sale to them from Mrs. Waters, agreeing to let her retain possession for that year, with the privilege of redeeming them whenever she could pay for them. Some litigation sprung up between the parties relative to the possession of the slaves, when it was adjudged that Mrs. Waters was entitled to the possession of the property. She held the negroes till the first Monday in January thereafter, when they disappeared and were found in the custody of Mann. No one knew how the change of possession took place. This proceeding is at the instance of Mrs. Waters, to re-possess herself of the property; apprehending that the warrant, under which the litigation was had in the Fall of 1859, would be used by Mrs. Waters, Mann moved to continue the case to some future day, in order to prove by Phillips, the Sheriff, that the judgment re-

dered under the warrants only entitled Mrs. Waters to retain the slaves till the end of the year. The Court refused to postpone the case for that purpose, and this is the first error assigned.

Concede that the evidence could have been made, and would have been legal; in the view we look upon the rights of these parties under the Act of 1821, the testimony would have been wholly immaterial. And I would remark, that Mr. Ballard and others abundantly established the fact, that the negroes were to be surrendered at the close of the year 1859. For the purposes of this decision, we assume that point to be satisfactorily proven.

The only effect of this proof is to raise the presumption that the present possession of Mr. Mann was by the consent of Mrs. Waters. But now comes in the evidence of Mr. Williams, that subsequently to all this, he, at the request of Mrs. Waters, and acting for her, called on Mr. Mann to tender him the purchase money, and then redeem the negroes, which Mr. Mann refused to accept, alleging the negroes were worth three thousand dollars, thus rebutting effectually the inference that the negroes were voluntarily surrendered; and such no doubt was the view taken by Judge CABANISS in the case.

We see no objection as to the mode in which the Fall warrants of 1859, were proven. Indeed, independent of these Warrants, the testimony is entirely sufficient and uncontradicted, that Mrs. Waters was entitled to the peaceable possession of these negroes till the end of the year 1859.

We see no reason for disturbing the judgment of the Court, but must remit the party to such other remedy, if any, as he may see fit to institute.

Judgment affirmed.

Sharman vs. Jackson.

SHARMAN vs. JACKSON.

1. Elizabeth Tankersly, by a deed of gift, gave to her son, William F. Jackson, certain negroes, at the death of the said William F. to be equally divided among the heirs of the body of the said William F. Matilda, a daughter of the life-tenant, married one Sharman and died, leaving children and her husband surviving her in the life of her father. *Held*, 1st. That the words heirs of the body did not create an estate tail in the life-tenant. 2d. That the person who should answer that description at the death of William F. Jackson, took the estate as purchasers and not by descent; that their interest during the life-estate was contingent and not vested. 3d. That in the distribution, the children of Matilda take *per stirpes*, and not *per capita*.

Trover, in Upson Superior Court. Decision by Judge CABANISS, November, 1859.

This was an action of Trover brought by Thomas S. Sharman, as administrator of Matilda C. Sharman; deceased, against Winfield S. Jackson, for the recovery of certain negroes contained in the following deed of gift, and upon which plaintiff alone relied in support of his title, viz :

"GEORGIA, MONROE COUNTY :

"Know all men by these presents, that I, Elisabeth Tankersly of said County, in consideration of natural love and affection, which I have for, and bear for my son William F. Jackson, have this day given to him the following negroes : Patience, Charles, Bill and Winney, during his life, and at his death I give Patience to my grand-children, Eliza Jane Jackson and Maria Louisa Jackson ; and Charles, Bill and Winney, at the death of said William F. to be equally divided among the heirs of the body of said William F., reserving to myself the possession and use of said negroes during my life, without paying any hire therefor.

"Signed, sealed and acknowledged this 17th day of June, 1825.

(Signed) "ELIZABETH TANKERSLY, L. S.

"In the presence of W. Johnson, W. B. Clark, J. P.

"Recorded 20th June, 1825."

After reading the deed, plaintiff proved that Matilda C. Sharman, deceased, was his wife, and that she departed thi

Sharman vs. Jackson.

life in the year 1844, and that William F. Jackson died in 1856, and that said Matilda C. was his daughter, and that she was in life at the date of the foregoing deed. Upon this testimony plaintiff rested his case, and defendant moved for a non-suit on the ground that said deed vested no title in remainder in said Matilda C. Sharman, she not being in life at the time William F. Jackson died.

The Court granted the motion, and ordered a non-suit, and counsel for plaintiff excepts.

JAS. M. SMITH & P. W. ALEXANDER, for plaintiff in error.

GIBSON, GREEN & PEEPLES, *contra*.

By the Court.—LYON, J., delivering the opinion.

Three points arise in the construction of this deed. 1st. Whether by its terms an estate tail is created. 2d. Is the remainder a vested or contingent one? 3d. Who will take under the limitation to the heirs of the body?

1. As to the first, we consider it well established, that although these words, "heirs of the body," do, *prima facie*, import an estate tail, yet in the language of Lord Hardwick; *Hodgson vs. Bussey*, 2 Atk. 89, "the general run of cases makes this plain, that notwithstanding they sound like words of limitation, yet upon circumstances and the intention of the parties, they may be construed words of purchase, and descriptive of the person who is to take." See also, *Archers' case*, 1 Co., *Kemp vs. Daniel*, 8 Ga. 385. The superadded words, "at his decease to be equally divided," exclude the idea of a perpetuity, and take from the words that technical signification that the Law ordinarily attaches, and gives to them their natural sense; hence we hold that they were used, here as words of purchase, and not of limitation, and that they do not create an estate tail.

2. The limitation over then being good, is the remainder contingent or vested? It was insisted on by counsel for plaintiff in error, who is also plaintiff in the Court below, that the words "heirs of the body," must be considered as synonymous with children, and hence that Matilda Sharman, who was a child of the tenant for life, in life at the date of the deed, took a vested remainder, and which on her death

Sharman vs. Jackson.

before the determination of the life-estate was transmissible to her legal representative. But do these words when construed to be words of purchase, necessarily mean children? We admit that they may be used as synonymous with children, but we know no rule of construction which says they must be so taken; and we apprehend that an examination of the cases will show that whenever they have been so interpreted, it has been in consequence of the supposed intention as collected from explanatory words contained in the deed or Will before the Court. They have been construed to mean next of kin. 1 *Rich. Eq.* 145, *per Dunbin Ch.* They have been used in the various senses of children or the persons who should answer the description of heirs at the time of his death, or in the technical sense, as *nomen collectivum*, to signify the whole line of succession. *Harper Ch. in Rice's Eq.* 87. We have seen that they are not here used in the last sense. There is nothing in the context to show an intention to use them in the sense of children, and there can be no good reason why they do not import in this case such persons as answer that description at the death of first taker, considered in their natural sense, and not technical sense, as the grantor evidently intended by their use, whether such persons should be children, grand-children, or great-grand-children.

No words of explanation are to be found in the instrument, and we consider that they create a contingent remainder to a class of persons who at the death of the tenant for life would answer the description of heirs of the body. Wherever the remainder is limited to a person not in esse, or not ascertained, then the remainder is contingent. *Fearne* 217. As if a lease be made to one for life-remainder to the right heirs of *J. S. Boraston's Case*, 8 Co. 20 a. In *Else vs. Osborne*, 1 P. Wms. 38, after a settlement for life on the grantor, with remainder to trustee during his life, &c., there was a remainder to the heirs of his body. Lord Chancellor Cowper decided it to be plainly a contingent remainder, being limited to the heirs of the body of A., who can have no heir during his life, for *nemo est hæres viventis*. *Baily vs. Morris* 4 Ves. 798, was a case in which there was a limitation by deed after life-estates to husband and wife to the heir male of her body by him, to be begotten, and for want of such heir remainder over. A son was born of the marriage, who died during the life of the wife, and through whom the plaintiff

Sharman vs. Jackson.

claimed. *Held*, that this was a contingent remainder in such person as should be heir male at the death of the wife; the Court saying, "This is the case of a deed, therefore, I am of opinion that the limitation subsequent to the estate for life of E. H. was a contingent remainder to such person as would be heir male of her body at her death, in fee, and as *nemo est hæres viventis*, and Thomas H. (the son,) died in the life of the mother, that remainder never took place." This reasoning and decision was afterwards adopted by Lord Cottenham, *Chancellor in Chambers vs. Taylor*, 2 *Mylne and Cr.* 376. That is almost a parallel case. The son having died in the life-time of the mother, the tenant for life, no estate ever vested in him, and here, Matilda Sharman having died during the life of the tenant for life (her father,) no interest ever vested in her. The only interest which Matilda Sharman took by this deed was a bare possibility. Being presumptive heir at the time of its date, she had a mere hope of succession, which is not devisable, 8, *T. R.* 92, and consequently not transmissible to her representatives.

Wherever the limitation is contingent by reason that the person or persons to whom it is directed cannot be ascertained, as in the case of a limitation to the right heirs of J. S. (then living,) no interest will vest in the heirs during the life of J. S., nor will it be transmissible or descendible from any one dying before it becomes vested. *Fearne* 371, *Doe vs. Tomlinson*, 2 *M. & S.* 170.

Indeed, these words, heirs of the body, in themselves, import a contingent remainder, for admitting that the person who will be heir is in being, still it is uncertain whether the person who would be heir should the ancestor die at a particular time, may not die before the ancestor, and hence the person who will eventually be heir, is one, who even if he is in being, cannot be ascertained until the death of the ancestor. And hence, it is a general rule that a remainder limited to the heir or heirs of a living person, is a contingent remainder. To this there are certain exceptions, as where there are explanatory expressions showing that they were used in some other sense, as sons, or children, as denoting the persons who at the time are the apparent heirs. Another exception is, when, by the celebrated rule in Shelly's case, the words are to be considered as words of limitation. 2 *Fearne* 202. In this instrument, however, there are no explanatory words showing

Sherman vs. Jackson.

an intention that they are used as synonymous with children, or sons; or daughters, or that they are intended to designate any particular person, who at its date were the heirs presumptive of the tenant for life, and having already determined that by reason of the superadded words, the term heirs of the body are taken out of the application of the rule in Shelly's case, they must *ex vi termini*, constitute a contingent remainder by virtue of the maxim, *nemo est hæres viventis*.

By this construction we violate no intention of the donor, as collected from the instrument. The children of Jackson living at the date of the deed, and who were then his apparent heirs, were not the immediate objects of her bounty. This is manifest from the creation of a prior life-estate. She, no doubt, intended to give the benefit of this disposition first to her son for life, and then to those who, at his death, would stand towards him in the relation of his heirs. It would be a most forced construction to say that after the death of her son, the tenant for life, she intended the property to pass away from his family and go to strangers. But this would be the result were we to hold that the words heirs of the body, are here synonymous with children, and that they took vested remainders transmissible to their legal representatives. This presumption of intention has no bearing on the decision we give. Her intention is to be looked for in the deed itself, and there is nothing there inconsistent with the construction we put upon it. "At his death to be equally divided among the heirs of his body," we construe to mean a remainder to those who at that time would answer to the description of heirs of the body; that is, the lineal descendants upon whom the Law would cast the descent of lands if the ancestor had died intestate. *Lemacks vs. Glover*, 1 Rich. Eq. 141. And it is undoubtedly competent that an interest may be limited to such persons as shall at a particular time sustain a particular character. *Halloway vs. Halloway*, 5 Ves. 401.

Where property is given to a class of persons, and not by name, it will take in all who shall answer the description at the time the gift shall take effect, and if there be but one, though it be expressed in the plural number, that one will take. *Swinton vs. Legare*, 2 McCord's Ch. R. 445; *Myers vs. Myers*, 2 ib. 257, 259.

It is clearly established by *De Visme vs. Mele*, 1 Bro. Ch. Cas. 537, and many other cases, that when the testator gives

any legacy or benefit to any person not as *persona designata*, but under a qualification and description at any particular time, the person answering the description at that time is to claim. *Godfrey vs. Davis*, 6 Ves. 43.

It follows, therefore, that as the husband or representative of Matilda Sharman at the death of Jackson, the life-tenant does not answer the description of persons to whom the gift is made; that he cannot take, but that her children, who do answer to that description, and who are also within the intention of the donor, take instead. And so the judgment of non-suit was properly awarded by the Court below.

3. It having been ascertained who are to take under the description, it remains to be determined, how the distribution is to be made under the direction "to be equally divided." We hold that they are to take *per stirpes* and not *per capita*; and this opinion is founded on the intention of the donor, as gathered from the words of the instrument, construed in reference to, and in connexion with, the Statute of Distribution of this State, by which the grantor evidently contemplated that the property should be distributed among these persons.

Elizabeth Tankersly in making this deed, never could have meant that one, of a half dozen grand-children, should take equally under the deed with one of the children of her son, the life-tenant, who was in life at the making of the instrument, and directly within the scope of her immediate intended bounty. It is true, she says equally divided, but that is to be understood and construed as that equal division made by the Distribution Laws, that is, that all the heirs related to the first taker equally, or in the same degree should take equally, while those who were in the same line, but further removed, should take by representation, that is, all together standing in the place of the deceased parent, and taking but the share or proportion which is equal with the shares of the children. This is an equal division among the heirs of Wm. F. Jackson, and it is not the less so that one or more of the shares must again be sub-divided into as many parts as there are grand-children distributees.

Matilda Sharman was in life at the execution. She was in the eye of the donor at that time, as one who would take an equal share with the other children at the death of her father, should she at that time be in life; but she was not, and as her children, equally with herself, answer the descrip-

 Sharman vs. Jackson.

tion, one degree farther removed, they fall in, filling up the gap caused by her death, and take only that distributive part of the estate which would have come to her had she lived, just as the Law would have distributed the property to them had William F. Jackson absolutely possessed the property in his own right and died intestate. *Buskin's Appeal*, 3 Penn. R. 304, was a case very much like this. The testator, after making certain bequests, directed thus: "Then my Will is, that the remaining part of my goods, stocks, &c., shall be impartially appraised, and after such appraisement made, that the same *shall be equally divided between all the heirs*." The Court held that, "By these expressions, the testator means his own heirs, which can only be ascertained by resorting to the Statute of Distribution, as has often been done in analogous cases; and taking this to be the rule, it descends to the children and grand-children *per stirpes*. This shows the persons who are to take, and the same rule must be applied to the quantum of the estate."

In England the rule would be different, but the reason of the rule cannot be the same here as there, on account of the difference in the Law of Descents. In *Lemack vs. Glover*, Reported in Rich. Eq. 141, this question was well considered by Chancellor Harper. The testator in that case bequeathed the use of personal property to his sister Jane, and after her death bequeathed the same to the heirs of her body, to them and their heirs and assigns forever." The Court held, first, that the words, "heirs of the body," were words of purchase. Second, that all who answered the description of the heirs of the body at the death of Jane, were entitled; but the Court dividing equally as to whether such persons took *per capita* or *per stirpes*, there was no decision of that question. Chancellor Harper holding that they took *per stirpes*; Chancellor Johnson and Justice's O'Neal, Evans, Wardlow, concurring; while Chancellor Johnston, Dunkin and Justice's Richardson, Butler and Frost, held to the contrary. We think the opinion in favor of the *per stirpes* distribution is the better one. The other is put on the ground that the rule was settled in the previous adjudication of *Campbell vs. Wiggins*, Rice Eq. 10, and not upon reason or Law, and with the candid confession that such rule, when applied to the circumstances of that case and considered in connexion with the proportion in which the distribution is to be made, the Court

is constrained to doubt whether the intention of the testator is not sacrificed, (perhaps necessarily sacrificed,) in deference to an established rule. The opinion of Chancellor Harper, on the other hand, from its strength, clearness, and ability, and in accordance with the manifest intention of the testator in that case, and the donor in this, is entitled to great respect, and attention at least in considering the question, if it does not, in fact, amount to a Judicial precedent. He says, "I would not depart from the English cases when they apply, but I think our Statute of Descents and Distributions, making the distributees of personal estate identical with the heirs of land, (as in our own Statutes,) makes a new case, and admits and requires a different construction. In England, the heir at Law is in general a single individual, and the plural "heirs of the body," serves to denote the succession. When these words, therefore, are held to denote a class or classes of persons, it may be said that there is nothing on which to found the notion of representation, or that the parties are to take otherwise than *per capita*. With us, certainly, it must be competent for a testator to give his own or mother's lineal descendants in such shares and proportions as they would have taken land by descent in case of intestacy. And when he describes them as heirs of the body, nothing can more plainly express their intention. They are to take as heirs in every respect that they can so take, only it is by purchase instead of descent. In England, when taken to mean a class of persons, these cannot in any respect take as heirs, or heirs of the body. Whether construed children, issue, descendants, next of kin, &c., they must always be different persons from the heirs. It is said in cases of coparcenary or gavel-kind, that all the individuals who take, make up but one heir. But with us, the heir is made up of component parts in different proportions. In the present case, I think he consists of two individuals, each entitled to one-fifth of the estate, of six persons, each entitled to one-third of one-fifth, or one-fifteenth, and of two persons each entitled to one-tenth. So they would have taken any land of which their mother had died intestate. And this agrees with what the Law supposes to be the rule of affection, by which children are preferred to grand-children, and nearer kindred to the more remote."

WILLIAMS vs. FAMBR0.

1. In action to recover damages for the killing of a slave, the defendant may give evidence of the slave's character for turbulence and insubordination, for the purpose of aiding the probability of his theory of defense that the slave was killed in an act of insubordination, and also for the purpose of mitigating the damages; but the evidence must come from witnesses who knew the slave to have had such a disposition, or from admissions of the plaintiff, and not from general reputation, nor from proof of previous particular acts of insubordination on the part of the slave.
2. Such an action to recover damages for the killing of a slave, need not be preceded by a prosecution for the felony.

Trespass *vi et armis*, in Pike Superior Court. Tried before Judge CABANISS, at October Term, 1859.

This was an action brought by Allen G. Fambro against Richard W. Williams, for the recovery of damage for killing a negro man slave, named Jim, *alias* Jim Sheet, the property of plaintiff. The declaration alleged that the negro was worth \$1200, and that he came to his death by wounds inflicted upon him by defendant.

The defendant pleaded the general issue.

Upon the trial it appeared from the testimony, that at the time the negro was killed, 23d March, 1857, the defendant was overseeing for plaintiff; that the plantation upon which the negro was killed, was in the county of Crawford, and that plaintiff resided about thirty miles distant. None of the witnesses examined was present at the killing; the negro was found dead—stabbed in the left side; the wound having the appearance of having been inflicted with a long knife. The defendant lived on the plantation with his family, and had charge of the negroes as plaintiff's overseer; that he was absent when the witnesses who were examined first went to the plantation and found or saw the negro dead; that he left immediately after the killing.

When the case was called for trial and plaintiff announced ready, defendant moved for a continuance, on the ground of the absence of a witness who resided in the County, and had been duly subpoenaed, and by whom defendant expected to prove that the negro killed was of bad character, turbulent and unruly. Plaintiff objected to the showing as insufficient;

the testimony of the absent witness, as stated by defendant, if procured, being immaterial and inadmissible. The Court held the showing insufficient, and refused the motion to continue, and defendant excepted.

The plaintiff having closed his testimony, the defendant offered to read the depositions of one Robert D. Walker, a witness examined by commission. The substance of the answers of this witness was, that he knew the boy, Jim; that his character in the neighborhood was, that he was hard to manage and control, and of a violent disposition. That in January, 1856, he commenced to oversee for plaintiff, who told witness that if Jim complained of being sick, to give him some medicine, and if he was not sick, to put him to work; witness went to the door of the house where Jim was, and told him if he was well enough, to take his tools and go to work. Jim replied, that when he was sick his master never allowed him to work, and he'd be damned if he would do it; witness struck him with his fist, and went to get his whip, when Jim followed him out into the yard and picked up an axe and went back into his house. Plaintiff then told witness not to go into the house until he, plaintiff, went in and brought the boy out; plaintiff said the negro was dangerous, and advised witness to go armed, so as to defend himself. About three weeks after this, witness undertook to whip him for playing cards; he swore he'd be damned if he should do it, and picked up a stick and struck at witness; witness then had him tied and whipped him; witness remained on plaintiff's plantation four months, and whipped Jim three times; he attempted to strike witness one time, and resisted twice; says he was afraid of him, and good cause to be in the night, but not in the day. Nat Lucas and Frank Bacon told witness that the character of the negro was bad, and they wanted him to keep Jim away from their plantations; they said he was a dangerous negro, and of bad habits; witness considered him dangerous.

Plaintiff's counsel objected to the reading of these depositions, upon the ground that the testimony was irrelevant and immaterial. Defendant's counsel stated that this testimony was offered for two purposes: 1st. To show the character and conduct of the negro. 2d. To mitigate the damages. The Court sustained the objections and ruled out the depositions, so far as they went to prove the general character of

Williams vs. Fambro.

the negro for violence, unless some act of violence was shown to defendant, or knowledge on his part of the negro's character for violence. To which ruling defendant excepted.

The testimony being closed, defendant's counsel requested the Court to charge the Jury, that plaintiff could not maintain this action for damages, without first showing that he had prosecuted the defendant to conviction or acquittal on the criminal side of the Court. The Court refused so to charge, but charged that plaintiff had the right to maintain this action, and to recover therein, without prosecuting the defendant criminally to conviction or acquittal. To which charge and refusal to charge, counsel for defendant excepted.

The Jury found for the plaintiff twelve hundred dollars. Whereupon defendant moved for a new trial, on the ground that the verdict was contrary to Law and evidence, and because of error in the rulings, decisions, charges and refusal to charge above stated and excepted to. The Court overruled the motion, and defendant excepted.

PERLIS & SMITH, for plaintiff in error.

GIBSON & FLOYD, *contra*.

By the Court.—**STEPHENS, J.**, delivering the opinion.

1. We think the plaintiff in error was entitled to the continuance to get the benefit of Barron's testimony, and that he ought also to have had the benefit of Walker's testimony, which was offered but ruled out. We think the testimony of these two witnesses was material and admissible, so far as it related to their own general knowledge of the negro's disposition, or to Mr. Fambro's statements concerning his disposition, but not admissible so far as it related to previous particular acts of violence on the part of the negro, or to general reputation as to his disposition. To go into proof of particular acts of the negro, would be to open a collateral issue involving "all things that he ever did." Such proof coming collaterally, would come without the least notice to the opposite party, and therefore without opportunity to meet it by preparation. Proof by general reputation is obnoxious to the objection that it is hearsay. It is clearly within the general Rule against hearsay, and we do not perceive that it is

WILLIAMS vs. FUMERO.

within any of the exceptions. When reputation is in issue, as it may be in several classes of cases, it may be shown by general report, or rather the general report, in that case is the very thing to be proven, and of course may be proven. But the thing to be proven in this case was, not the negro's reputation, but his character, his disposition or nature, and especially his aptness for strife and his proneness to insubordination—a fact which ought to be proven by witnesses who knew it, or by the admissions of the opposite party. The fact, if proven from the proper sources, ought to have gone to the jury for two purposes, as tending to aid the theory of the defense that the negro was killed in an act of insubordination, and as tending to lessen the value of the negro, and so mitigate the damages. To prove a proneness to insubordination, to be sure, does not prove an act of insubordination, but it does increase the probability of the story when there is, as there was in this case, other evidence suggestive of such an act. Such a story of rebellion, if told by a witness, or indicated by circumstances, ought to be more easily believed concerning a violent, turbulent negro, than concerning a meek, humble one. I think that any mind in search of truth in such a case, or finding itself in doubt, would want to know the character of the negro. The presiding Judge intimated that he would have allowed this evidence, if it had been shown that this character had been communicated to Williams before he killed the negro. His knowledge or ignorance has nothing to do with that bearing of the character which I have pointed out. The sole purpose for which character was admissible in this case on the question of justification, was from the negro's general readiness for rebellion, to render more probable the evidence which tended to show an act of rebellion at the time when he was killed; and this probability is evidently not affected in the slightest degree by Williams' previous knowledge. The light comes from the fact that the negro was one who was apt or likely to do such an act as the one imputed to him, and not from Williams' knowledge of the fact.

As to the bearing of the negro's character upon the question of damages, it is very obvious that a negro's bad character detracts from his value, and ought to lessen the damages for killing him. In this view the evidence need but be confined to his particular character for insubordination, but

Williams vs. Fambro.

ought to be allowed as to his bad character in general, for a bad character in any respect is one element affecting his value.

2. We agree with the presiding Judge, that a previous prosecution for the felony to a conviction or acquittal, was not necessary to the maintainance of this action. In the case of *Neal vs. Farmer*, 9 Ga. Rep. 555, this Court held that this doctrine applied only to such felonies as were felonies at Common Law, and that at *Common Law* no killing of a slave was felony, and therefore that an action to recover damages for the killing of a *slave* need not be preceded by a prosecution for the felony. We were invited by the argument in this case to review and reverse that decision. Without considering its original propriety, the decision ought to be maintained *now*. It was made nine years ago, and attracted the universal attention of the profession at the time. The Legislature with full knowledge of the decision for nine years, not having changed the Law declared by it, may fairly be considered as acquiesced in it. The great body of the Common Law derives its authority from decisions of Courts and Legislative acquiescence in them. We adhere to this one.

Judgment reversed.

*Walker et al. vs. Floyd.*WALKER *et al.* vs. FLOYD.

1. It is no ground of continuance, of itself, that a full report of a decision of this Court in the case on trial has not been received by the party desiring *et cetera*.
2. To be entitled to a continuance on account of the absence of a practicing attorney from the Court, the party desiring such witness must show the same diligence to hear the attorney in attendance, or to obtain his evidence, as for that of any other witness.
3. When money is in the hands of an officer of the Court on which counsel claim a lien for fees which is controverted by the client to whom the money belongs, a Rule is a proper remedy to settle all questions between client and attorney in respect to the same.
4. To such Rule the attorney need not attach a bill of particulars of the various services he has rendered, steps taken or things done in the different stages of the litigation in which the service was rendered, nor need he, on the trial, go into proof of the same; the services in a particular litigation must be in pleading, and proof, treated as a whole.
5. Such proceeding will not lie for services not yet rendered.

Rule, in Upson Superior Court. Tried before Judge CABANISS, at November Term, 1859.

In an Equity case pending between James S. Walker and others, against Nathaniel F. Walker, an award was made against defendant under a rule of reference. He, in part payment of the amount awarded against him, paid to James M. Smith, Esq., one of plaintiff's solicitors, a considerable sum of money—between ten and fifteen thousand dollars. This was a rule by John J. Floyd, Esq., one of the solicitors of complainants in said cause, against Smith, to pay over to him out of said fund, the sum of two thousand dollars for counsel fees due to him by complainants in said case, or show cause to the contrary, &c. This rule was predicated upon the ground or principle that movant, as solicitor aforesaid, had a lien, as counsel for his fees on the funds in the hands of Smith, who was associate counsel in said cause, and an attorney of the Court. The question as to the right to maintain this form of procedure, and how to be tried, were decided upon a bill of exceptions brought to the Supreme Court in this and other cases, at August Term, 1859. (*See 29 Geo. Rep.*, 185.) The case being remanded by the Supreme Court, came up again for trial, before Judge CABANISS, at November Term,

Walker et al. v. Floyd.

1859. J. S. Walker, N. F. Walker, jr., and F. Coleman, complainants in the Equity cause, came in under the rule and defended, and were the real parties respondents.

The cause being called, counsel for respondents moved to continue the case, on the following grounds:

1st. In order to enable them to obtain and have the opinion of the Supreme Court pronounced in the cause at Atlanta, August Term, 1859.

2d. Because of the absence of H. Hill, Esq., a material witness for respondents; that witness was a practicing attorney of this Court, residing in Macon, Georgia, and that they reasonably expected that he would be present at this Term of the Court, and at this trial; that he had not been subpoenaed, nor had any steps been taken to take his depositions.

It further appeared, that the remittiter from the Supreme Court, remanding the case for a new trial, had been received and entered on the Minutes of the Court below.

The Court refused the motion to continue, and respondents excepted.

Counsel for respondents further objected to proceeding to trial, on the ground that Rule was not the remedy in a case like this; that it could only hold up the fund in Court, but that movant must establish his demand by action at Law.

The Court overruled the objection, holding that an attorney at Law had a lien on money raised under a judgment obtained by him for his client, which he can enforce by Rule; and respondents excepted.

Counsel for respondents further objected to the Rule, on the ground that the cause of action, or the particular services rendered, was not distinctly set forth and specified in the Rule.

The Court overruled the objection, and respondents excepted.

Counsel for respondents, in the progress of the examination of the witnesses, objected to their testifying as to services rendered, unless such services were specifically set out in the pleadings, and further objected to the witnesses who were lawyers giving their opinions as to the value of the services rendered by plaintiff.

The Court overruled the objections, and respondents excepted.

The case being submitted to the Jury upon the evidence, argument of counsel and charge of the Court, they returned a verdict for plaintiff for two thousand dollars.

Whereupon, counsel for respondents tender their bill of exceptions, assigning as error the rulings and decisions aforesaid.

N. M. HARRIS and B. H. BIGHAM, for plaintiffs in error.

GIBSON & PEEPLES, *contra*.

By the Court.—LYON, J., delivering the opinion.

1. The Act of 22d January, 1852, "to regulate the practice of the Supreme Courts and of the Superior Courts of this State, &c.," provides, "That when any cause shall be sent back to the Superior Court by the Supreme Court, the same shall be in order for trial at the first Term of the Superior Court next after the decision of the said Supreme Court. And where either party may have exhausted their continuances on the appeal, the said Superior Court shall have full power and authority to grant one continuance to said party as the ends of Justice may require." Under that Statute, the plaintiffs in error were not entitled to a continuance of the cause on the first ground. The record does not show that they had exhausted their continuances. That Statute evidently intended that the Court should continue only for a good and sufficient cause shown. That the mere fact that a full report of the decision of the Court in the former trial had not been received, should not, of itself, be a sufficient ground of continuance. But that when the continuances allowed by Law, on proper showing made, had been exhausted, that then the Court might continue on a like showing one time more, if the ends of justice required it. These parties gave no reason why the decision of this Court was necessary to a full understanding and settlement of their rights before the Court, or in what way it could benefit them in that trial. Nor can we see how the want of that judgment has injured or even affected their rights.

2. To entitle one to a continuance on account of the absence of an attorney, who is a witness for him, it is necessary that he should show that he has used the same diligence to

Walker et al. vs. Floyd.

procure his attendance or his testimony, if he resides out of the county, as any other witness, notwithstanding the attorney, at the time, may be a regular attendant upon, and practitioner in, the Court where the testimony is desired to be used; for the reason that, although the attorney is for certain purposes an officer of the Court, he is not so for all purposes. He is not obliged to attend the Court. He attends the Court voluntarily in the pursuit of his profession as the prosecutor of his client's rights before the Court. And as the plaintiff did not come up to this rule, the motion for continuance was properly overruled.

3. Counsel for plaintiffs in error demurred to the form of proceeding on three grounds:

1st. That a Rule was not the proper remedy.

2d. That the Rule did not plainly and distinctly set forth the cause of action, and did not contain a bill of particulars of the services rendered.

3d. That there was a branch of the litigation still pending. Whether a Rule was the proper form of proceeding for settling the issue between these parties, was made and determined against plaintiffs in error in this same case, in the name of *Smith vs. Goode*, 29 Geo., 185, with the reasoning of which the plaintiffs must be satisfied.

4. The employment of counsel goes to the whole of the litigation, from the time of his employment to the end of the same, and he is expected, and it is his duty, to do every service in the progress of the cause that is necessary for the prosecution, protection or defense of his clients' right—in all things to represent and insist upon his rights, and his compensation is to be measured by the amount involved; the benefits conferred; the services actually rendered that was necessary to be rendered, and the time the litigation was continued. But it is not the practice, and it would be bad policy, to fix a specific charge for each specific thing done by counsel in the progress of the cause. There would be no end to the charges, and no inducement to counsel to bring the litigation to an end. Without enlarging further upon this point, we hold, for these reasons, that it was not necessary to attach a bill of particulars to the rule to show cause why the money should not be paid. It is sufficient if the Rule show on what account it is moved and in what litigation the service was rendered. In other words, all that is necessary is, that the

Smith *et al.* vs. Overby.

Rule should contain sufficient to put the client on notice and to bar a future demand of the attorney for the same service, and this we think this Rule does. And this, we think, disposes of all objection to the testimony of the witnesses sworn on the trial on the same ground.

5. The attorney could not move this Rule against a fund in Court for services not yet rendered. But we do not understand that to have been the object or effect of this proceeding. It was a claim for fees for such services only as had already been rendered; and in a litigation which was ended.

Some other points appear in the bill of exceptions, but as they were not argued or relied on, and as we do not see any merit in any of them, we take it for granted that counsel for plaintiffs in error abandoned them and did not desire this Court to pass upon them. The main ground relied on was, that the attorney's claim for services could not be enforced as a lien against the fund in Court by Rule, but must be ascertained and fixed by an action at Law as all other claims; and this question was decided as before stated, and against the plaintiffs at Atlanta, August Term, 1859, of this Court.

Judgment affirmed.

SMITH *et al.* vs. OVERBY.

1. *Although a charge be literally correct, still, if the language was calculated to mislead the Jury upon a material point, a new trial may be awarded.*
2. *The doctrine of damages discussed.*

Case, in Newton Superior Court. Tried before Judge RICE, at September Term, 1859.

This was an action on the case brought, in the first place, by William H. Smith, against Benjamin H. Overby, a physi-

Smith et al. vs. Overby.

man, to recover damages for the neglect and want of care, skill and attention of defendant in delivering plaintiff's wife of a child, defendant being called in as an accoucheur, or man-midwife, on said occasion.

The defendant pleaded the general issue.

Plaintiff afterwards amended his declaration by making his wife, Harriet D. Smith, a co-plaintiff, and alleging that defendant injured the said Harriet D. by gross negligence, inattention and unskillful treatment in and about the delivering the said Harriet D. of a child, and by cutting and lacerating the child with a jack-knife, while in the womb, and before its birth, and other wrongs and injuries done to said Harriet D., &c., and causing her great mental and bodily suffering, and destroying her health and peace of mind, to the damage of the plaintiffs twenty-five thousand dollars.

The parties submitted their testimony; after which, and argument by counsel, the Court charged the Jury, who returned a verdict for the defendant. Whereupon, counsel for plaintiffs moved for a new trial, upon the following grounds:

1st. Because the verdict was contrary to Law and evidence.

2d. Because the verdict was contrary to the charge of the Court.

3d. Because the Court erred in charging the Jury, that the damages must be confined to the actual injury sustained by Mrs. Smith, in her person.

4th. Because the Court erred in charging the Jury, that in this case the plaintiffs are not entitled to recover what is called exemplary or vindictive damages.

5th. Because the Court erred in charging the Jury, that plaintiffs are not entitled to recover damages by way of example or punishment.

6th. Because the Court erred in charging, that if the necessity existed, and no better instrument was at hand or could be procured in time, then, from the necessity of the case, defendant might use the knife, and that the physician is not responsible for any error in judgment on such occasion; such error arising from the peculiar circumstances of the case, and not from want of proper care or skill.

The presiding Judge refused the motion for a new trial, and annexed to his decision, overruling the motion, the following as a portion of his charge, necessary to a proper understanding of the grounds of the motion for a new trial, and of the reasons of the Court for refusing the said motion, viz

Smith et al. vs. Overby.

The Court, after a statement of the pleadings, charged the Jury, among other things, as follows:

"This action is not brought for any injury sustained by the husband, but is brought by the wife, Mrs. Smith, for the injury which she alleges she sustained on the occasion of her accouchment. The husband, William H. Smith, is joined in the action, but the damages are to be given for the injury sustained by the wife, Mrs. Harriet D. Smith. To sustain the plaintiff's action, the plaintiffs must prove that Mrs. Harriet D. Smith sustained injuries as alleged in their declaration, and that those injuries were attributable to a want of a reasonable and proper degree of care and skill in the defendant's treatment on the occasion mentioned in the plaintiff's declaration. The profession of the physician is one of the learned professions; and in regard thereto, as in all professions, in the practice of which, learning and skill are required, the rule of Law is, that every person who enters into a learned profession undertakes to bring to the exercise of his profession a reasonable degree of care and skill. He does not undertake to use the highest possible degree of skill; for there may be persons who, from having enjoyed a better education and greater advantages, are possessed of greater skill in their profession; but he undertakes that he will bring a fair, reasonable and competent degree of skill. The care and skill required of him ought to have reference to the nature of the business he is called on to perform. To embody these principles so as to make them more immediately applicable to the case before us, the Court charges you, that a physician called on to deliver a woman in labor, does not undertake that he will, at all events, safely deliver the woman of her child, without injury to the mother or child; but he undertakes that he will bring to the work a fair, reasonable and competent degree of care and skill in reference to the operation to be performed. Again: Of necessity, the physician acting as an accoucheur must judge from the circumstances attending the accouchement the necessary treatment of the case, and the operation, if any, necessary to be performed to accomplish a delivery. He is called in for the very purpose that by his skill he may judge what is necessary to be done; and by his skill to do it; and he is not responsible for an error in judgment on such occasion, if such error arises from peculiar circumstances of the case, and not from want of

Smith et al. vs. Overby.

proper care or competent skill on his part. As to the use of the knife, the Court charges you that if the necessity existed, and no better instrument was at hand, or could be procured in time, then, from that necessity, the defendant might use the knife."

The Court further charged the Jury, among other things, as to damages: "That if Mrs. Smith sustained any injury from want of proper care or competent skill on the part of the defendant, then the plaintiffs are entitled to recover damages for the actual injury she sustained. You will take all the circumstances into consideration, and award damages to the plaintiffs for all the injuries Mrs. Smith actually sustained from any want of skill or of proper care on the part of the defendant. Any pain or suffering caused to Mrs. Smith by defendant's want of skill or care must be taken into consideration as injuries in awarding damages to the plaintiffs; and you will award such damages as will be a full compensation for all the injuries which Mrs. Smith sustained by reason of any want of skill or proper care on the part of the defendant.

"Plaintiffs are not entitled in this case to recover what are called exemplary or vindictive damages; that is, the plaintiffs are not entitled to recover damages of the defendant for the sake of example or as a punishment on defendant.

"The foregoing is so much of the charge of the Court as is necessary for a full understanding of the errors complained of. It is proper that the Court state, as a reason for giving the last one of the above charges, viz: the charge in relation to exemplary or vindictive damages, that the plaintiffs' counsel, in their argument before the Jury, insisted on the right of plaintiffs to recover exemplary or vindictive damages by way of punishment of defendant.

"GEORGE D. RICE,

"Judge S. C."

To which decision, overruling the motion for a new trial counsel for plaintiffs excepted.

CLARK & LAMAR, for plaintiffs in error.

J. J. FLOYD, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Smith et al. vs. Overby.

This is an action brought by the husband and wife against the defendant, as a physician, for an injury done to the wife in delivering her of a child. Upon the evidence, and under the charge of the Court, the Jury found a general verdict for the defendant.

A new trial was moved for, mainly on the ground of the misdirection of the Court as to the Law. The application was denied; and this is the judgment excepted to and sought to be reversed.

The declaration, as amended, claimed damages, not only for the bodily pain and injury inflicted upon the mother, but also for the mental sufferings occasioned, as it is alleged, by the unnecessary destruction of the life of the child; and the burden of complaint is, that owing to the manner in which the Law was given to the Jury, this last ground of grievance was withdrawn from their consideration. At any rate, that the Jury were misled, or likely to have been so, by the charge; that the Jury might have been satisfied that Dr. Overby did not bring competent skill to the treatment of the case, and yet they permitted him to escape because it was not shown that the wife had not sustained any bodily injury.

It is true, the Court did not restrict, in so many words, the finding of the Jury to the bodily injury done to the wife, as is assumed in the motion for a new trial. On the contrary, the Judge directed them to all of the injuries complained of in the declaration; and yet, we can readily believe that the Jury did not so understand the instructions given to them, and that their finding may have been the result of this misconception. The Jury are directed that the plaintiffs are entitled to recover for all the injuries Mrs. Smith "*actually sustained*" from any want of skill or proper care on the part of Dr. Overby; and the same phraseology is repeated in the charge, and the mind of the Jury is no where called to the anguish of maternal feeling produced by the destruction of the child; and for this reason, we think it will better subserve the ends of justice to have this case re-examined.

As to the degree of skill and care required of a physician, we find no fault in the charge. And we concur with the Court, that this is not a case, judging from the evidence in the record, for positive damages, even conceding that there are cases where exemplary damages may be awarded. The defendant may have exhibited a want of skill, for which he

is responsible. But we see nothing in the proof that should subject him to be punished as an example to others.

The first question to be settled by another Jury is, Does it appear, from the evidence, that Dr. Overby was so deficient in care or skill as to subject him for the consequences of his mistreatment? And if so, what should be the compensation to which the plaintiffs are entitled?

The proof is, that the case was one of difficulty, owing to the unnatural presentation of the child. But were the circumstances of such an extraordinary character as to excuse the physician for any fatal mistake which he may have committed? Dr. Overby gave two accounts of the obstacles which he had to encounter. One was, that he supposed there were yet two other children in the womb, one having been already born; and that the remaining two were united or "linked together," to use his own language, so as to prevent him from turning them. The other was, that the second child could not be turned, owing to the sudden and violent contraction of the womb, after the expulsion of the other child.

The first hypothesis turned out to be unfounded. As to the second, neither the testimony of Dr. Stewart nor any other witness shed any very satisfactory light. True, Dr. Stewart swears that had the same circumstances existed, two hours before (when the amputation of the arm and probable death of the child took place) which surrounded the case when he arrived, it would have been easier to have effected a delivery than when he got there. He found no difficulty in effecting a delivery in ten or fifteen minutes. But then the system of the mother was greatly relaxed, even to syncope. She had fainted and was actually unconscious when the child was born. Upon the next trial, medical skill can make this point plain.

It occurred to me on the argument, that the conduct of the physician, which most needed explanation, was this. He seems to have come to the conclusion that nothing but partial dissection of the child could save the mother. Hence he proceeded to amputate the protruded arm; and having administered an opiate, he desisted from doing anything more until the arrival of Dr. Stewart, two hours afterwards. We take this decided course, thus causing, as it probably did, the death of the child, and then stop short, without considering his purpose?

Smith et al. vs. Overby.

Since delivering the opinion which I did in this case, and before leaving Court, I am inclined to think that, in my ignorance, I may have magnified this apparent error. By reference to the cases of difficult preternatural and complicated labor commented upon by Dr. Robert Lee, in his *Treatise on Clinical Midwifery*, a standard work kindly placed in my hands by an eminent accoucheur, I am inclined to think that the amputation of the arm, and the opiate administered, might, after the delay which intervened before the arrival of Dr. Stewart, have produced quite a change in the condition of Mrs. Smith, thereby enabling Dr. Stewart readily to deliver the child, which the forcible contraction of the womb, at the time of the amputation, have prevented; and that the practice pursued by Dr. Overby may likely be sustained by the highest medical authority.

Case No. 3, at page 122, in the *First American* from the *Second London Edition* of that *Treatise*; and *Rambootham's Book on Transverse Presentations*, with the *Illustrations*, have brought my mind to the conclusion, that while a physician of more skill and experience may have succeeded in saving the child, yet, that the evidence does not satisfactorily establish that want of proper care and skill, under all the circumstances of this case, which should make the defendant liable for any want or error of judgment he may have committed. In cases of doubtful practice, a certain amount of discretion must be exercised by the qualified Medical man. A contrary doctrine would drive from the profession many worthy men, or render them timid, where confidence and boldness were demanded.

As to the law of damages, it is not necessary to decide between the conflicting opinions of those distinguished juriconsults, Professor Greenleaf and the late Mr. Sedgeweck, the former holding that damages are compensatory only; and the latter, that the Jury may give damages, not only to recompense the sufferer, but to punish the offender where the elements of fraud, malice, gross negligence or oppression mingle in the controversy; thus blending the interest of society with that of the aggrieved individual.

We apprehend that in most of the cases, when carefully examined, it will be found, that whether the injury be done to person or estate, the measure of damages is, after all, the actual injury inflicted, neither more nor less.

An assault and battery is committed on the person by pulling plaintiff's nose or spitting in his face, the object being to degrade him. What I ask is the actual injury? The mere bodily suffering? That is nothing. Man has a moral as well as a physical nature. Here the injury is to his feelings—his honor—his pride—his social position. Suffer these to go unprotected, unredressed, and life itself is no longer tolerable nor desirable. Hence, the Jury in such case should render large damages, not as punishment, but to compensate the actual injury. They must put a price upon the manhood of a freeman, and make the defendant accordingly.

Let this illustration suffice. Analyse the cases, and the same solution applies to all. Courts and text-writers have not clearly comprehended this doctrine and the philosophy of it. Otherwise, there would be harmony instead of confusion and apparent contradiction upon this subject.

Apply the rule to the case before us: grant that Mrs. Smith felt that the fruit of her womb has been lost to her, and that all her maternal yearnings and fond affections had been doomed to cruel disappointment, and yet, that there was no want of sympathy and proper exertion on the part of Dr. Overby, and that the misfortune was attributable entirely to his want of requisite skill for the emergency, while she would still suffer, and be entitled to compensation for her grievances; yet, how much keener and more poignant would have been her grief, and to how much larger damages would she be entitled, if her sorrow and anguish were the result of unfeeling, though conscious empiricism!

Goodwyn vs. Hightower. Hightower vs. Goodwyn.

GOODWYN vs. HIGHTOWER. HIGHTOWER vs. GOODWYN.

1. The failure to file a brief of the evidence at the time when the motion for a new trial is made, is cured when the party seeking to take advantage of it, has appeared and argued the motion, or has, by his own fault, caused the failure.
2. A creditor holding a debt against a principal and deceased surety, is under no duty to give notice of the existence of his debt to the administrator of the surety. He must give notice when he seeks to hold the administrator personally liable for a wrong application of the assets to other claims, but need not do so in order to hold the estate liable for the debt.
3. The surety is not discharged by any such indulgence of the principal as is not granted for a valuable consideration.

Assumpsit, and Motion for New Trial, in Pike Superior Court. Decision by Judge CAHANISS, at Chambers, January, 1860.

The above two causes were argued together, and one opinion pronounced, covering and deciding the questions and points made in the bills of exceptions in both cases.

This was originally an action by Goodwyn against Martha J. Hightower, administratrix of Daniel Hightower, deceased, on a promissory note given by one Gaines H. Fryer, who was principal in the note, and Daniel Hightower, defendant's intestate, who was surety only. The suit was brought against both, but Fryer, not being served, it proceeded alone against Mrs. Hightower; and she dying pending the motion for a new trial, James M. Hightower, administrator *de bonis non*, &c., was made the party defendant.

The defense relied upon was, that plaintiff had given indulgence and extended the time of payment, in consideration of usury, and that he had failed and neglected to give to the administratrix notice of his demand within the twelve months as provided by Law.

The testimony being closed, the presiding Judge charged the Jury, in substance, that it was incumbent on the plaintiff to give to the administratrix notice of his demand within twelve months from the grant of administration; and if deceased was only surety on the note, and by this neglect to give the notice, defendant had been rendered unable to secure the

Goodwyn vs. Hightower. Hightower vs. Goodwyn.

debt from the principal, and the estate had suffered injury by such neglect, then defendant was discharged; but if the neglect to give the notice had not caused any injury, and defendant had not thereby been deprived of means of securing her intestate's estate against said debt, then said estate was not discharged. More forbearance to sue will not discharge a surety, but if a binding and valid contract is made by the holder with the principal, without the consent of the surety, to give further time for payment, that is a discharge of the surety.

To which charge plaintiff excepted.

The Jury found for the defendant; whereupon, plaintiff moved for a new trial, upon the grounds—that the verdict was contrary to Law and evidence, and the charge of the Court, and because the Court erred in the charge aforesaid.

Upon the argument of the motion for a new trial, counsel for defendant moved to amend and correct the brief of the testimony by the addition of a few words left out or omitted by the presiding Judge, who took down the testimony. Counsel for plaintiff objected to the amendment. The Court overruled the objection, and plaintiff excepted.

Upon the final hearing of the motion for new trial, at Chambers, 19th January, 1860, counsel for defendant moved to dismiss said motion, upon the grounds—

1st. Because no motion for new trial was made and filed in the Clerk's office at the trial Term of said case.

2d. Because no brief of the oral evidence was filed in the Clerk's office at the trial Term.

The Judge refused the motion to dismiss, and defendant's counsel excepts, and this is the error assigned in defendant's bill of exceptions.

The Court, after argument on the merits of the motion for new trial, refused the same, and plaintiff's counsel excepts, and this refusal is the error assigned in plaintiff's bill of exceptions.

G. J. GREEN, and O. C. GIBSON, for defendant.

J. B. PINCKARD, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

Goodwyn vs. Hightower. Hightower vs. Goodwyn.

1. Nos. 14 and 16 being argued together, one decision covers both cases. No. 16, wherein Goodwyn is the plaintiff in error, is the main case, and Hightower, who is the defendant in error, brings up the other merely as a reason for sustaining the judgment in the first. No. 16 was a motion by Goodwyn for a new trial, and No. 14 was a motion by Hightower to dismiss that motion for certain causes. The Judge overruled both motions, refusing to *dismiss* the motion for a new trial; and refusing the new trial on the merits. The position which Hightower occupies in this Court is, first, that the Judge was right in overruling the motion for a new trial on the merits; and second, that if he was wrong in the merits, he ought to have dismissed the motion for the technical reasons, and so have arrived at the same result of disallowing the new trial. We think the Judge was right in refusing to dismiss the motion for a new trial. The reasons assigned for a dismissal were two, which resolve themselves into the single one, that no brief of the evidence was filed during the Term when the motion for a new trial was made. The other ground, that no motion for a new trial was made during the Term when the verdict was rendered, is only another form of stating the first ground; for the only showing made in support of it, is the same as that made in support of the other; to-wit: not that no actual motion was made, but that no valid one was made in conformity with the requisitions of Law, the failure consisting in the lack of a brief of evidence. The evidence on this point from Goodwyn's counsel is, that the motion was made during the trial Term, and signed by himself, and that he then left the Court under an agreement with Hightower's counsel that *he* (Hightower's counsel) would make out the brief of evidence and file it in due time. Oak Gibson, who was Hightower's counsel, *declined to deny that statement*, saying that his memory would not authorize him to do so, and that he believed his brother to be incapable of making a false statement. If the statement was true, it was decisive against the motion to dismiss, for this Court has held repeatedly that the filing of a brief of evidence is waived by appearance and argument of the motion; and for the additional and still stronger reason, that in this case, the failure was the fault of the party who was seeking to take advantage of it, since a performance of his agreement would have prevented the failure. That the statement was true, Oak Gib-

Goodbye vs. Hightower. Hightower vs. Goodbye.

son declined to dispute, and he can scarcely expect the Courts to do for him what he refuses to do for himself. The Judge who heard the case was satisfied of the truth of the statement, and so are we. We think, therefore, he was right in overruling the motion to dismiss.

2. We think he ought to have granted the motion for a new trial, on two grounds: He charged the Jury that it was the duty of the holder of the note to give notice of its existence to the administrator of the security within twelve months after the appointment of an administrator. Surely the holder of a note is not under any duty to give notice of his debt to the administrator of his debtor, whether that debtor be principal or surety. He is under a necessity to do so for one purpose, and for one only: When he seeks to hold the administrator *personally* liable for a failure to get his debt paid out of the assets of the estate according to its legal priority, it is a necessary preliminary step for him to show that he has given notice of his debt before there was a misapplication of the assets to other debts, or that he has given it within twelve months after the appointment of the administrator. It is not necessary for him to do this in order to hold the estate liable, but only to make the administrator liable personally for any misapplication of the estate's assets to other debts.

3. We think the Judge also erred in refusing this new trial, on the ground that the verdict was contrary to the evidence. There was a good deal of discussion on this branch of the case, as to what conduct on the part of the holder of a debt will discharge a surety; but there is not in this record the slightest proof of any conduct which could operate as a discharge under any of the rules which were invoked. The evidence shows that the holder indulged the debtors, but there is not the slightest evidence that the indulgence was given for a consideration, or under any legal hindrance to a suit. So far as the evidence discloses the facts, he neither did say nor injure to the surety, nor omitted any which duty required of him. It is well settled that no discharge results to the surety from such indulgence of the principal as is granted to mere entreaty, and not on account of a valuable consideration; for such indulgence being voluntary, is determinable at the will of the creditor, and can be no legal obstruction to the collection of the debt. No indulgence was

Curry et al. vs. Curry et al.

shown in this case, except just such as this. ' The case being once relieved from the idea that the creditor is under a duty to give notice of his debt to the administrator of his debtor, all further difficulty disappears. We affirm the judgment in No. 14, and reverse it in the main case.

Judgment reversed.

CURRY *et. al.* vs. CURRY *et. al.*

1. Testator by the 2d item of his Will says, " I give my servants John, a man, and Betsy, a woman of yellow complexion, to my executors hereinafter named, in trust to convey said negroes immediately after my death to some one of the non-slaveholding States of this Union, as the said executor may select, or to whomsoever said servants may elect for a master in this State before John T. Stephens." *Held*, to be in conflict with the Act of 1818 against manumission and void.

Caveat to Will, in Monroe Superior Court. Tried before Judge CABANISS, August Term, 1889.

Peter M. Curry and others, heirs at Law of Wiley Curry, deceased, filed their Caveat to the probate of the second and fourth items of the last Will and testament of said deceased, on the ground that said items were in violation of the Statutes prohibiting the manumission of slaves, and were therefore void.

These two items are as follows :

" Item 2d. I give my servants, John, a man, of yellow complexion, and Betsy, a woman of yellow complexion, to my executor, hereinafter named, in trust to carry said negroes, immediately after my death, to some one of the non-slaveholding States of this Union, as the said executor may elect, or to whomsoever said servants may elect for a master in this State, before John T. Stephens.

Curry et al. vs. Curry et al.

"Item 4th. "I desire my executor, out of any funds in his hands, to pay John Goodman, my worthy and trusty friend, the sum of one thousand dollars, the interest on which is to be annually paid to my servants, John and Betsy, after their removal to a free State, by the said John Goodman, and at the death of said John and Betsy, said sum to be equally divided between their children. It is my Will that five hundred dollars, of said one thousand, be considered in trust for said John, and five hundred for Betsy; if either die without children his share to go to the other—if both die without children, said sum to come back to my estate, and to be disposed of as the rest of my negroes are hereinafter disposed of. If said John Goodman refuses said trust, I desire my executor to make application to the presiding Judge of the Flint District for the appointment of some fit and proper person to said trust."

Upon the trial the *factum* or execution of the Will was admitted, as also, that testator was of sound and disposing mind and memory.

Propounders then offered to prove that after the execution of the Will, but before the death of the testator, the negroes, John and Betsy, informed said testator whom they would choose as their master, and testator expressed himself satisfied with their choice. Caveators objected to this evidence; the Court sustained the objection, and propounders excepted.

Caveators admitted that John and Betsy, the negroes named in the 2d item of the Will, did a few days after testator's death, choose their masters, to-wit: John selected Willis Curry, Jr., as his master, and Betsy chose Mrs. Sarah Babcock as her mistress, and that the negroes were delivered to the said Willis Curry, Jr., and Sarah Babcock who paid nothing to the executors for them. They were not appraised as a part of testator's estate.

Propounders then offered in evidence the paper propounded as the Will. Caveators objected to the second and fourth items being read to the Jury, upon the ground that they were void and contrary to Law. The Court sustained the objection and excluded said items, and propounders excepted.

The remainder of the Will was read and submitted to the Jury, who found the following verdict:

"We, the Jury, find the paper propounded to be last Will and testament of Wiley Curry, deceased, except the second and fourth items of the same."

Curry et al. vs. Curry et al.

Counsel for propounder moved for a new trial upon the following grounds:

1st. Because the Court erred in rejecting the evidence offered to prove the choice made by John and Betsy of their master, prior to testator's death, and his approbation thereof.

2d. Because the Court erred in holding that 2d and 4th items of the Will of deceased, were void under the Statutes prohibiting emancipation, and withholding them from the Jury.

The Court overruled the motion for a new trial, and propounders excepted and assign said refusal as error.

JAS. S. PINCKARD, for plaintiff in error.

PEEPLER & CABANISS, *contra*.

By the Court—LYON, J., delivering the opinion.

Is the second item in the Will of testator void under the Acts of 1801, and 1818, prohibiting manumission of slaves in this State? And this is about the only question in this record for our consideration, as the other questions depend entirely on it.

Had the testator stopped with the gift to his executors of these slaves, in trust to convey them immediately after his death to some one of the non-slaveholding States of this Union, there is not a doubt but that the Court would have been bound by previous adjudications to have declared that this bequest was not in violation of those Acts, for whether such intended manumission is within the mischiefs intended to be remedied and prohibited by those Acts, it is quite clear that the Courts from that day to this have steadily and uniformly declared in favor of the legality of such bequest.

It would be arrogant in me to say, that adjudications on this subject were wrong, even if it should be conceded that this was an open question.

But with the most profound respect for those eminent lawyers and high Courts, who made these adjudications, it is impossible not to feel that those decisions have left many grave questions not very satisfactorily answered, such as, Is not such emancipation in conflict with the letter of those Acts? Would not a deed having for its purpose the same object in

Curry et al. vs. Curry et al.

view, to be enforced in the life-time of the maker be void? or rather, could it be enforced in the Courts of this State? and if so, by whom and at whose instance? If the executor in a Will having this provision should refuse to execute it, or the slaves should refuse to go, how could it be enforced? It will not do to say that it can be done upon the application of the slave, or on his behalf, for as a slave he has no civil right, and no legal capacity whatever. If the slave takes any interest whatever, under the Will, it is that with which it intends to invest him with freedom. He takes all or nothing. It requires all that to enable him to assert his rights, and if the Will confers that on the slave, it is void. Again, would not the great object of the Law and its true policy, have been better promoted by a different ruling? It is too late at this day to inquire whether that interpretation is the true one or not, for those decisions of the Courts, right or wrong, have for me, at least, all the force of a positive enactment, and so the Court holds.

But this testator goes one step farther, after directing his executors to convey said slaves, immediately after his death, to some one of the non-slaveholding States of this Union, as the executor may select, he adds, "or to whomsoever said servants may elect for a master in this State before John T. Stephens."

Does this alternative direction of the testator afford a sufficient evidence on his part to violate the provisions of the Laws of this State, prohibiting the manumission of slaves as will require this Court to pronounce this item void? We think that it does, and I now proceed to give the reasons for that conclusion. Whenever the intention of the testator is to give an estate in the negroes mentioned different from what the Act of 1818 admits, the bequest is void.

The Acts of the Legislature against manumission look to the prohibition of all manumission, and of all attempts to effect it either directly or indirectly. The intention of the Legislature was to prohibit qualified manumission—to prohibit owners from placing them in a situation, where according to Law, they would be pronounced slaves, yet would be entitled to some of the rights and immunities of freemen. *Robinson & Wood vs. King*, 6 Ga., 547.

The negroes, John and Betsy, are the entire object of the bounty of the testator, as expressed in the 2d item of his

Will. His first direction to his executor is, "to convey them to some of the non-slaveholding States," for what purpose is not expressed. It is only from construction that we conclude even as to this clause of that item, that he intended that the negroes should be free on reaching the State selected. We know that the negroes could not reside in one of the non-slaveholding States as slaves, hence we conclude that testator's intention was that they should be free. Had the clause gone no farther, as I have said, this Court would have been compelled, under previous adjudications, to have given effect to the bequest. But it goes further, the executors are directed to "convey the negroes to whosoever the said servants may select for a master in this State." For what purpose, to be slaves in fact, or in name only? How is the title to vest in such unnamed, unknown and indifferent personage? All this is left to conjecture, presumption and construction. We are told that inasmuch as testator used the words 'convey' and 'master,' he meant that such person as the slaves might elect for a master should take the negroes under the Will absolutely and forever as slaves, in fact and not *pro forma*; that such person would take the negroes and their natural increase, as slaves, to himself and his heirs forever. And we must presume all this to have been the intention of testator, by the words employed, to sustain this item of his Will. Taking this whole item together, (and we must do so to get the intention, for it has reference to but one subject, and but one object in view, and must all stand or fall together,) can we presume or conclude that such was the intention of the testator; that is, that the person elected by the negroes, for their master, should sustain to them only the ordinary relations that exist between master and slave, with the right and power to sell, barter, give, or use them in any and every way he thought proper as slaves? Such presumption or conclusion is not at all consistent with the intention of testator towards these negroes, as is manifested in every word of that item of his Will. It would defeat the whole object of the bequest; that is, to confer a real or supposed benefit on the negroes manifested by giving them this extraordinary power. The intention of testator was that these negroes should be free, wherever they might be, either here or in a non-slaveholding State. They were the objects of his bounty—not the person they might elect for a master. What was the inducement to

Cutry et al. vs. Cutry et al.

him to give these negroes to the persons they might elect for a master? It was in the power given to the slaves, and possible for them in their choice, to elect persons in no wise related, or even acquainted with testator. The bequest gave, as it was intended, the widest possible range within the State to make their election, and no matter upon whom it fell, however unworthy or unknown to testator, the conveyance and title followed as a necessary conclusion. Such person could not have been the object of testator's bounty. It was for no benefit to such *elect* that this bequest was made, but it was for the benefit of the negroes wholly and solely, and the inducement or consideration moving the conveyance to the elect was such contract or agreement as the negroes might make with such persons that would but promote and subserve the great leading object of that bequest, by giving to the negroes John and Betsy, the largest possible freedom without actually being free.

The bequest was in fact, placing a charter of the liberty of these negroes in their hands to go throughout the State and trade and traffic on it until such person should be found who would give them the largest liberty for the least consideration; one in whom they could confide, who would hold them nominally as slaves, while for all practical purpose they would be free. There is no time fixed within which they must elect. In the interim, what is their condition, slaves or free? Neither the one or the other—*quasi slave—quasi free*. It cannot be doubted but that such a condition is obnoxious to the provisions of the Act of 19th Dec., 1818. Look at the intention of the Legislature expressed in the preamble to that Act: "*And whereas, divers persons of color, who are slaves by the Laws of this State, having never been manumitted in conformity to the same, are nevertheless in the full exercise and enjoyment of all the rights and privileges of free persons of color, without being subject to the duties and obligations incident to such persons, thereby constituting a class of people equally dangerous to the free citizens of this State, and destructive of the comfort and happiness of the slave population thereof, which it is the duty of the Legislature by all just and lawful means to suppress.*" By this Will these negroes are slaves, yet they are in the full exercise and enjoyment of all the rights and privileges of free persons of color, without the burdens. They have a higher and greater

Curry et al. vs. Curry et al.

right than the free negro, for the social right and legal capacity of election to be free is in their hands. I cannot imagine a condition of the negro more hurtful to a proper and necessary regulation of the slave population, or one more obnoxious to the provision of the Act. Should such a bequest be sanctioned by this Court as a legal disposition of these slaves, there would be no end to which the system would be carried. As emancipation is now prohibited by Statute, whether to take effect in or out of the State, this plan would be instantly laid hold of and followed as a happy expedient by persons, who, from improper relations with these slaves, or from other causes, desire after their death that the condition of the slaves should be altered, until a large class of this sort of population will be established throughout the State, obnoxious to the Laws, dangerous, mischievous and corrupting to the slaves. New Legislation would be required to abolish the system, not to eradicate the evil, for that would be impossible. The effect would continue, like free negroedom, a perpetual blight on the institution.

How much better is it to strike at the evil as we do here, while it is yet in the bud, and break it up, root and branch, before it has laid a basis for its own propagation.

Should we be mistaken in this view of the question, there are other reasons why this bequest is void.

This bequest, as I have already shown, is a gift to the slaves themselves, and is void for that reason; for, as slaves, they have not the capacity to take property, either by purchase or descent. In *Watters vs. Blocker*, 6 Porter 269, Collier, C. J., says, "If the bequest of freedom be considered as a legacy to the slaves, it cannot be maintained, for being themselves in servitude, they have not the capacity to take property by purchase or descent. As it regards their transmission from owner to owner, they are considered as personal property, and rather as things than persons. It is essential to every gift that there should be a donor, a donee, and a thing given; the donee must have capacity to take and to hold; when he has neither, the conveyance is absolutely void. If a devisee has not capacity to take when the estate ought to vest, the devise is void. A slave cannot hold property, and the holding for him is illegal, whether by trust or otherwise." If it be said that the slaves are not the donees of themselves, but their *elect* is, we answer that then the

Curry et al. vs. Curry et al.

bequest would be void for uncertainty, if not otherwise obnoxious to the emancipation Laws of the State.

But again: as slaves they could not elect; they have no legal capacity to exercise such power, that is, the privilege and the right of a freeman, and the testator could not clothe them, as slaves, with any such power or capacity; and the attempt to do so makes the bequest void. The manumission Laws of Alabama are very much like our Act of 1801—they do not go as far as that of 1818. There is nothing in the Acts of that State resembling the preamble I have herein extracted from the preamble of the Act of 1818. Notwithstanding, such a bequest would be void in Alabama. In *Carroll & Wife vs. Brumby* 18, Ala. 102, the testator in the clause of the Will before the Court says, "In relation to my kind and faithful servants, Jane, &c., it is my will that they be permitted to go to Africa, their passage paid, and two years support allowed, &c. If however, my said servants prefer to remain subject to my said daughter as they are to me, they may be permitted to do so, but in no event shall they be sold or deprived of their privilege before or after the death of my daughter."

The Court held the bequest to be void, saying, "It is true that the testator did intend to give them the option of freedom or servitude, but they (the slaves) have not the legal capacity to choose: the slave has not capacity to accept."

Such a bequest as this would be void under the Statutes of Virginia, although that State not only does not have such a stringent policy or spirit in regard to the manumission of slaves, either partial, absolute or mixed, as is contained in our Act; but manumission by deed or will is expressly allowed, by positive enactment. In *Baily vs. Poindexter*, 14 Grat., 182, testator provided in his Will that the slaves loaned to his wife for life should have their choice of being emancipated or sold publicly. The Court, in that case, held the emancipation of the slaves was made by the Will to depend on their election to be free. And as slaves have no legal capacity to choose, the provision is void, and of no effect. DANIEL, J., delivering the judgment of the Court, page 19 says: "When we assent to the general proposition, as think we must do, that our slaves have no civil or social rights; that they have no legal capacity to make, discharge or assent to contracts; and that a slave cannot take anythi

under a decree or will except his freedom, (allowed by the laws of that State—forbidden by ours,) we are led necessarily to the conclusion that nothing short of the exhibition of a positive enactment, or of legal decisions having equal force, can demonstrate the capacity of a slave to exercise an election in respect to his manumission. Any testamentary effort of a master to clothe his slave with such power is an effort to accomplish a legal impossibility. No man can create a new species of property unknown to the Law. No man is allowed to introduce anomalies into the ranks under which the population of the State is ranged and classified by its constitution and laws. It is for the master to determine whether to continue to treat his slaves as property, as chattels, or in the mode prescribed by Law, to manumit them, and thus place them in that class of persons to which the freed negroes of the State are assigned. But he cannot impart to his slaves, as such, for any period, the rights of freed men. He cannot endow, with powers of such import as are claimed for the slaves; here, persons whose *status* or condition in legal definition and intentment exists in the denial to them of any social or civil capacity whatever." MONCURE, J., who dissented from the judgment of the Court in this case, admitted broadly that the slaves have no civil rights or legal capacity, but he put his dissent on the ground that the emancipation was the act of the master, and not of the slave; that *that* was the intention of the testator, and as it was a legal one, the Court should endeavor to effectuate his intentions.

In *Williamson vs. Coalter*, 14 *Grat.*, 394, testatrix, by her Will, says: "I direct, in regard to the balance of my negroes, that they shall be manumitted on the first day of January, 1858." She then directs her executors to raise a fund out of her estate sufficient for the purpose, and use it in settling her said slaves in Liberia, or any other free State or country in which they may elect to live, and then says: "And I further direct that if any of my said servants shall prefer to remain in Virginia instead of accepting the foregoing provision, it is my desire that they shall be permitted, by my executors, to select among my relations their respective owners." In that case, the very one here, although the testatrix had the power to emancipate by Will, and although she directed an unconditional manumission at a certain time, with only a condition subsequent allowing them to waive the

Curry et al. vs. Curry et al.

provisions in their favor, the Court held, upon great argument and consideration, "That the freedom of the slaves is made dependent on *their election*, and they having no legal capacity to elect, the Will is ineffectual to emancipate them." It may be contended that, although this clause of the second item of this Will is void, yet, the direction to convey the negroes to a non-slave-holding State is not, and while the Court should declare the one to be void, it should give effect to the other.

To this, there are two replies: One is, that the clause void serves to demonstrate to the Court the intention of the testator in his entire scheme as to the *status* of these negroes, and that being to violate or elude the provisions of the manumission laws of this State, the whole scheme is void. The other one given by ALLEN, J., in *Williamson vs. Coulter*, 14 *Grat.*, 398. "No one has the right to say, or can say, what would have been the disposition of the testator if he had known he could not submit the alternative to the choice of slaves."

If, then, such testamentary disposition would be void under the existing laws of Alabama and Virginia, how much stronger and more forcible are the reasons for its being void under the stringent, precautionary enactments on this subject in the State of Georgia, especially when the Law itself makes it the stern and imperative duty of all the Courts and Judges of the State in the strong language that glares in the face of every Judge who passes on these questions: "So to construe the several provisions thereof as to carry the same into full and complete operation, according to the true spirit, intent and meaning thereof as declared in the preamble to the same."

It could make no difference in the legal effect of the clause, that the testator knew before his death, and after the making of the Will, that the slaves had made their election, unless the testator had acted upon that fact by making the bequest directly to such persons. Had he done so, the Will would not have been before us. It is upon the Will as it is, and as it was made, that we pass.

Of course the bequest of one thousand dollars in trust, for the use of these negroes, falls with the clause in their favor, and for the same reason, and for the additional one thousand bequest was not to operate in their favor until after they reached a non-slave-holding State.

So the Judgment stands affirmed.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT

MILLEDGEVILLE, ... MAY TERM, 1860.

Present—JOSEPH H. LUMPKIN, }
RICHARD F. LYON, } JUDGES.
~~CHARLES J. JENNINGS,~~ }

DAVIS vs. SMITH.

1. Where the issue is the capacity of the Contractor to make a contract, and the evidence, to say the least of it, is as strong on one side as the other, and no rule of Law has been violated in submitting the case, and there have been two concurrent verdicts of special juries against the contract, and the presiding Judge has refused to grant a new trial, this Court will not interpose to award a re-hearing.

In Equity, in Greene Superior Court. Tried before Judge HARRIS, at March Term, 1860. On the Appeal.

This was a bill in Equity, by James Smith, administrator of Peter Clarke, deceased, against Josiah Davis, to set aside a certain deed executed by complainant's intestate in his lifetime, conveying all or most of his estate to said Davis, upon consideration that Davis would maintain and support him during his life. The bill sought to set aside, vacate and annul said conveyance, on the ground that Clarke was an old man,

Davis vs. Smith.

in feeble health, and of such an imbecile mind, and at the time said deed was executed that he was incapable of making a contract or of managing his affairs.

Defendant answered the bill, denying that he used any improper means, or held out any inducements, or resorted to any fraud, in procuring or causing Clarke to make the conveyance aforesaid.

Complainants introduced and swore several witnesses, all of whom testified in substance, that they believed Clarke, at the time of the execution of said deed, to be incapable of making a contract, on account of weakness and imbecility of mind. It appeared that at or about the time the deed was made, that Clarke removed from where he had before been residing in the country, and went to live with Davis in the village of Greensboro', who supported him comfortably, and provided for all his wants and necessities until his death, which occurred on the 10th September, 1854, a few months after the execution of said deed; that Smith, the complainant, was the son-in-law of Clarke, having married a daughter who is still living.

Defendant examined several witnesses who testified that they were acquainted with Clarke, and although a man of rather weak mind, they regarded him as fully competent to manage his own affairs, and capable of making contracts. It further appeared that Martha, one of the negroes, died shortly after the execution of the deed, and that Winney was of very little use or value.

The Jury found for the complainant, decreeing that the deed of conveyance be set aside and annulled, and that defendant surrender and deliver up the property, with its increase, to complainant.

Defendant moved for a new trial on the ground, that the verdict was contrary to Law and evidence, and the charge of the Court.

The presiding Judge refused the motion for a new trial, pronouncing the following judgment: "I do hereby, after much consideration, refuse to grant a new trial, upon the ground that after two concurrent verdicts by two special juries for complainant, I ought not to disturb the verdicts and re-open the litigation, unless the findings were so palpably against evidence, and flagrantly violative of Law as to require a re-hearing. I cannot so consider them."

Davis vs. Smith.

To which decision, refusing and overruling the motion for a new trial, counsel for defendant excepted, and assigned the same as error.

AUGUSTUS REESE & F. C. FULLER, for plaintiff in error.

PHILIP B. ROBINSON, *contra*.

By the Court—LUMPKIN, J., delivering the opinion.

There is no complaint that this case was not fairly submitted by the Court to the Jury. On the contrary, one of the errors assigned is, that the verdict was contrary to the charge of the Court.

Was the verdict strongly and decidedly against the weight of evidence?

The witnesses on both sides are of the most reputable character; they differ as to the capacity of Clarke to make a contract. Who is to decide between them? We answer emphatically, the Jury.

Ambrose Hutchinson testifies, that Clarke was incapable to make a contract, and he assigns very sufficient and satisfactory reasons for this opinion. Dr. C. M. Park, the family physician of Clarke, concurs in this opinion. Dr. Curtright, who had known Clarke for thirty years, and who had been his family physician, previous to Dr. Park, swears to his incapacity to make a contract, and this witness declined to make a similar arrangement with him, respecting himself and property. In a short time afterwards, Clarke cried like a child, saying, the world could not make him give his property away from his children, and yet in two hours after this, he proposed to give his property to Mr. Griffin, who had accompanied Clarke to the house of witness. John Robbins confirms the testimony of the other witnesses, and states: that Clarke made the same proposition to him that Davis accepted. John J. Zachray, who knew Clarke well, swears positively, to his incapacity to make a contract, on account of the unsoundness of his mind. Phillip Clements, who proves Clarke to have been eighty years old, establishes also, his mental incapacity. James Smith concurs fully with the other witnesses who were examined as to the incapacity of Clarke to make a contract.

Some four or five gentlemen of the highest respectability, residing in Greensboro', some of whom were present at the execution of the contract, and who saw Clarke frequently after he came to reside in Greensboro', and two of whom attended upon him as physicians, are of the belief that Clarke was capable of making a contract. We must say, however, and in this we are abundantly supported by the record, that the opportunity for judging of the state and condition of Clarke's mind was much better on the part of the witnesses for the complainant, than those offered to support the deed, and the discrepancy between them may be accounted for in this way. In this and all similar cases, it is the peculiar province of the Jury to judge of the weight of the testimony.

When we take into consideration the fact, that the price paid for this property was grossly inadequate, according to the proof, that this imbecile old man was well taken care of by his children; from whose custody he was removed by a stranger; that two special juries of the county have concurred in pronouncing against this transaction, and that His Honor, the presiding Judge, has refused to disturb their finding, we cannot doubt that it becomes our duty to acquiesce in the judgment of the Court refusing to grant the motion for a new trial in this case.

Judgment affirmed.

CARSWELL vs. WARE et. al.

J. W., a parent, intending to divide and give off his negroes, made an allotment, in which certain negroes fell to the share of his son, J. M. W.; the negroes were not present, J. M. said to his son, that he might send for the negroes when convenient, but retained the possession, and never delivered them to J. M. W., but he subsequently conveyed the negroes by deed to one in trust for the children of J. M. W. The negroes were subsequently levied on under executions against J. M. W., and were claimed by the trustee. *Held*, that the gift was not complete in J. M. W. for want of delivery, and that they were not subject to the payment of his debts.

Claim, in Wilkinson Superior Court. Tried before Judge HANSELL, at April Term, 1860.

This was a claim interposed by James M. Ware as trustee of the children of John M. Ware, to certain negroes levied on by virtue of an execution in favor of John G. Gates, and transferred to Samuel M. Carswell, against John M. Ware, the father of the alleged *cestui que trusts*. Samuel M. Carswell dying pending the litigation, Matthew J. Carswell, his administrator, was made a party in his stead.

The *fi. fa.* was dated 11th October, 1855. Transferred for value received by Gates to Samuel Carswell 19th Dec., 1856. Levied 6th January, 1857, "On the following negroes, to-wit: Sarah, John, Nelly, Caroline and Susan, as the property of the defendant, pointed out by E. Cumming, Esq."

It was agreed by counsel on both sides, that the other cases pending and involving the same questions as presented in this case be considered at issue, and abide the result of this case, and that the testimony taken by commission in each and all of those cases, be read in this.

The testimony is voluminous, and it is deemed unnecessary to set it out. Suffice it to say, that the plaintiff in support of his right to subject the negroes to the lien of his *fi. fa.* relied upon the effect of a division made by James Ware of his slaves amongst his children in December, 1854, at which time, those in controversy, were allotted and assigned to John M. Ware, one of the sons, and contended that upon said division the negroes vested in, and became absolutely the property of, said John M., and subject to judgments against him. Claimant insisted that although there was a division and al-

Carwell on Ware et al.

lotment of the negroes by James Ware, at the time mentioned, among his children, yet that there was no delivery of the lot intended for John M., and that before there was any delivery vesting title in him, or extinguishing the title of said James Ware, the father, he executed a deed conveying said negroes to the children of said John M. Ware, and constituted James M. Ware trustee for said children, and that such was his intention at the time. The question in this case was, whether there had been such delivery of the slaves to John M. Ware at, and after the division, and before the execution of the deed to the children, which took place a few days after the division as to vest title in him?

The Jury found in favor of the plaintiff in *fi. fa.*, and that the negroes were the property of John M. Ware, and subject to the executions against him.

Claimant moved for a new trial on the following grounds:

1st. Because the verdict was contrary to Law and the charge of the Court.

2d. Because the verdict was decidedly and strongly against the weight of evidence.

3d. Because the Court erred in admitting the sayings of James Ware, the father of defendant in *fi. fa.*, and owner of the negroes, as testified to by John G. Gates, which sayings were made after the division, and after the gift of the negroes was alleged to have been made to his son John M. Ware.

4th. Because the Court charged the Jury, that there might be a constructive delivery to John M. Ware—that delivery may be actual or constructive.

After argument, the presiding Judge sustained the motion, set aside the verdict and ordered a new trial, on the ground that said verdict was decidedly and strongly against the weight of evidence.

To which decision counsel for plaintiff excepted.

COCHRAN & CUMMING, J. B. COCHRAN & JUNIUS WINGFIELD, for plaintiff in error.

N. A. CARSWELL, DEGRAFFENREID & RUTHERFORD, contra.

By the Court.—LYON, J., delivering the opinion.

James Ware, the father of John M. Ware, the defendant in error.

in execution, called his children together one day in the latter part of the year 1854, and made an allotment of his negroes, for the purpose of division and distribution among them. In that appointment, the negroes levied on fell to the share of the defendant. The negroes do not appear to have been present at the time. After the allotment, James Ware, the father, said to John M. that he could send for the negroes whenever it was convenient; he also said at that time, and frequently before, that the part which fell to John M. he intended to settle on the wife and children, or the children of John M. This share, so ascertained, was worth more than an equal one, and he was required to pay in some money to make it equal, and he did, on that day, pay over to one of the other distributees something like \$150; but whether he paid it out of his own money, or out of the proceeds of one of the negroes named Sam, that his father sold to Brenton Ware after the division, is not very clear. Most likely from his own money. He further retained the possession of all the negroes for a week or two after to finish gathering his crop. There was no other delivery or act done that might amount to one than what I have stated. James Ware subsequently refused to deliver the possession to John M., but conveyed them by deed, and delivered the negroes to James M. Ware in trust for the children of John M. These are all the facts, and the substance of all the testimony which it is necessary to notice. And upon them the question arises, whether the title to the negroes vested in John M. Ware, so as to subject them to the payment of his debts? That question depends entirely on the fact, whether the negroes were delivered to John M. in his own right, or whether the permission given to John M. to send for the negroes amounted to a delivery? and that is the whole question in this case.

1. There is no doubt but that James Ware intended to give the negroes, but whether to John M. or to his children, is not equally clear; the weight of testimony is, that he intended to give them to his children, and not to him. I might say almost overwhelmingly so; but whether the one way or the other, it is not necessary to inquire, as we hold, that the gift was not good, as a gift to either, for want of delivery, but that the title, notwithstanding the intention of James Ware in making the allotment, remained in him, until it passed out by the deed and delivery under it to James M. Ware, in trust

for the children of John M. To constitute a good parcel gift, there "must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. *If the thing be not capable of actual delivery*, there must be some act equivalent to it. The donor must part, not only with the dominion, but with the possession of the property." 2 Kent 438. In *Hawkins vs. Blewett*, 2 Esp. 668, the possession of the thing was actually given, but because the thing, the box given, was sent back to the donor the next day, at his request, to enable him to get a pair of breeches out of it, the Court held, that the gift was not good, as the donor had not parted with the dominion of the thing intended to be given. In *Burn v. Markham* 7, Taunt 280. A person supposing himself to be in *extremis*, caused India bonds, bank-notes and guineas to be brought out of his iron chest and laid on his bed, he then caused them to be sealed up in three parcels, and the amount of the contents written on them, with the words, "for Mrs. and Miss Olifton," the plaintiff; he then directed the brother to replace them in the iron chest to be locked up, the keys to be sealed up and directed "to be delivered to J," (his solicitor and one of the executors,) after his decease, and replaced in his custody, near his bed; and afterwards spoke of this property as given to the plaintiffs; the Court held, that this was not *donatio causa mortis* for want of a sufficient delivery and continuing possession. Chancellor Gibbs said, "There is no case which decides that the donor may resume the possession and the *donatio* continue; but all the cases agree, that if the donor resumes the possession, it ends the gift." Both of these were cases of gifts *causa mortis*, but the rule as to delivery is then alike, whether it be gift *inter vivos* or *causa mortis*. 2 Kent 438. In the case before us, the subject being negroes, was perfectly capable of an immediate delivery. There was nothing to prevent it, but there was no actual delivery, nor is it pretended that there was. John M. Ware did not get the possession, nor did he have the command and dominion; on the contrary, the possession and dominion remained with James Ware, so effectually, that John M. could get neither. James Ware did tell John M. that he might send for the negroes when it was convenient. This is equivalent to his saying, "send for them, and I will deliver."

them;" it amounted to a promise to give and nothing more; the *locus penitentiae* still remained. No case was read to us on the trial; I have been able to find none, and I apprehend that none can be found, in which such an act as this was ever held to amount to a gift or change of title.

Judgment affirmed.

PATTEN vs. NEWELL.

1. A charge, not warranted by fact, is error.
2. Parol evidence is incompetent to prove that a draft, payable to the order of P. generally, was intended to be negotiated at Bank.
3. The drawer is not discharged from his liability on a draft on the ground that the holder did not present it for acceptance or payment at the proper time, unless he is injured thereby.

Case, in Baldwin Superior Court. Tried before Judge LAMAR, at March Term, 1860.

This was an action by Richard Patten, for the use of Seaborn Jones, against Isaac Newell, on a draft drawn by Newell, of which the following is a copy:

"GORDON, 1st December, 1855.

"Sixty days after date please pay to the order of Richard Patten, Esq., sixteen hundred dollars, and charge to acc't.

"Yours respectfully,

"ISAAC NEWELL.

"To Messrs. Reese, Davis & Long,
"Savannah, Ga."

The declaration contained a count for money paid to Reese, Davis & Long, for defendant, and at his instance and request, amounting to eighteen hundred dollars.

The defendant pleaded the general issue; and further, that at the time the draft sued on fell due, defendant had funds in the hands of Reese, Davis & Long; and further, that defendant had a right to notice of the dishonor of said draft, being a paper owned by the Marine Bank, and that there was no transfer by which the action could be maintained by the plaintiff; and payment.

The testimony being closed, the Court charged the Jury, That if they believed that the draft bore evidence on its face of an erased and obliterated acceptance, then plaintiff must account for, and explain the same before he could recover. The Court further charged, That if the Jury believed, from the evidence, that it was a Bank transaction, then defendant was entitled to notice of non-acceptance, and if said notice was not given, defendant was not liable, even if the acceptance was for accommodation, of which they must judge from the proof. To which charge plaintiff excepted. The Jury found for the defendants; whereupon, plaintiff tenders his bill of exceptions, assigning as error said charge.

W. MCKINLEY, for plaintiff in error.

KENAN, *contra*.

By the Court.—LYON, J., delivering the opinion.

This suit was on a draft, of which the following is a copy:

"GORDON, December 1st, 1855.

"Sixty days after date, please pay to the order of Richard Patten, Esq., sixteen hundred dollars, and charge to acc't of

"Yours respectfully,

"ISAAC NEWELL.

"To Messrs. Reese, Davis & Long,
"Savannah, Ga."

The draft was never presented for acceptance or payment, but was discounted by Patten, and money enough given to him by Newell, which, with the proceeds of the draft so discounted, would make up the sum of \$1,800. And this sum of money was remitted by Patten to Reese, Davis & Long, to the credit of the drawer and defendant. Newell had n

funds in the hands of the drawers, either at the drawing or maturity of the draft for its payment, but was otherwise indebted to that firm. On the 1st. February, 1856, about the time the draft matured, the drawers acknowledged the receipt of \$800 to the credit of the defendant, but that sum was insufficient to pay either this draft or his other indebtedness to the firm. That firm also received from him, on the 15th of February, 1856, \$1,800; but that was too late to save this draft from dishonor, and seems, also, to have been on some special account.

There was a contest in the Court below, on the trial, as to whether there had not been an acceptance of this draft, and that acceptance stricken from the paper by erasure. The Court did not undertake to decide that question by an inspection of the paper, but submitted it to the Jury, with the following instruction: "If they believed the draft bore evidence on its face of an erasure or obliterated acceptance, then plaintiff must account for, and explain the same, before he could sustain an action and recovery thereon." For the purpose of getting the question involved in that charge, before this Court, and determined on its merits, counsel, by agreement, submitted the original paper to us for inspection.

1. From a careful examination of the original paper sued on, thus submitted, we are clear that no such acceptance, erasure or obliteration appears on the face of the paper. There has been a very heavy erasure, in ink, of some indorsement from the back, that shows darkly through the paper, and the Jury must have been misled by that appearance. The face of the paper was smooth, and had evidently not been written upon, other than the draft itself. So we think the charge was unwarranted by the fact, and erroneous.

The Court also charged the Jury, that if they believed, from the evidence, that this was a Bank transaction, then defendant was entitled to notice of non-acceptance, and if no such notice and protest was proven by plaintiff, defendant was not liable.

2. Whether the paper was intended to be negotiable in Bank, or was a Bank transaction, does not appear from the paper itself, and parol evidence was inadmissible to establish that fact. *Stubbs vs. Goodall*, 4 Ga., 106. was, then, no legal evidence of the fact before the Court to authorize that part of the charge. But there is a more serious objection to the charge.

Carroll vs. Warr et al.

3. This controversy was between the holder and the drawer, and as between them, the drawer is not entitled to notice of non-acceptance or of non-payment, whether the paper was a "Bank transaction" or not, unless the drawer has sustained some injury in consequence of a failure to demand payment at a proper time. *Daniel vs. Kyle & Barnett*, 1 *Kelly*, 304; *same case*, 5 *Ga.*, 245. If, for instance, the defendant had funds in the hands of Reese, Davis & Long, for the payment of this draft, and by reason of the non-presentation of the paper to them for payment, and want of notice to him of the non-payment, these funds were lost to him from the failure of the drawers or otherwise, then, in that or the like case, his liability on the paper would be gone. To be discharged from liability, the drawer must sustain actual injury from the act or neglect of the holder. Nothing of the sort exists in this case. The proof shows that he had no funds in the hands of Reese, Davis & Long to meet the draft. He lost nothing by the non-presentation, either for acceptance or payment.

Counsel for defendant insist, that although the charge of the Court might be erroneous, the verdict of the Jury was right upon the merits; that is, that the draft had been paid to Reese, Davis & Long, who were partners of Patten, the holder, and that being so, this Court ought not to disturb the verdict. We cannot agree with the counsel, for there is not one particle of evidence showing that the draft or any part of it was paid either to Reese, Davis & Long, or to Patten, but to the contrary. The witness, Hodges, says, in answer to the 6th direct interrogatory, that the charge for \$1,800 is not just. True, it is not, and the plaintiff does not claim it. It was only put in the declaration by plaintiff to fall back on as money advanced for defendant in case the Court should hold that he could not recover on the draft. All that the plaintiff claims, is the amount due on the draft; and, to our minds, the evidence is very clear, that that amount is still due, and unpaid by the defendant.

Judgment reversed.

HAMMOND vs. CANDLER.

1. All conveyances and contrivances for carrying a slave out of Georgia and bringing him back as a free man, to be added to the free-negro population of the State, are void; and the *status* of the negro remains just what it was before the first step in the process was taken.

2 A slave cannot acquire freedom in this State by lapse of time.

Recheat of Free Negroes, and Motion for New Trial, in Baldwin Superior Court. Tried before Judge LAMAR, February Term, 1860.

This was a proceeding by John Hammond, Ordinary of Baldwin county, and *ex officio* escheator thereof, to condemn escheat certain negroes, as being the property of a free and negro, Joe.

Candler interposed a claim, as owner of these negroes, and denying that they were free.

There was a trial at February Term, 1857, and verdict for escheator. Claimant moved in arrest of judgment, on the ground that the Jury who rendered the verdict were not sworn as required by Act of 1819. The presiding Judge sustained the motion, and counsel for the escheator excepted, and the Supreme Court reversed the judgment of the Court below, and remanded the cause. At the next succeeding Term of the Superior Court, (August, 1857,) but after the judgment of reversal by the Supreme Court aforesaid, counsel for claimant moved for a new trial, on the ground that the Jury were not sworn as provided by Law in escheat causes, and because the contract between Joe, the alleged free negro, and his master for his manumission was void, and that the Court erred in allowing the deed of manumission to be read in evidence to the Jury.

The presiding Judge refused the motion for a new trial, and counsel for claimant excepted, and the case again came up to the Supreme Court. That Court again reversed the judgment of the Court below.

For a more full statement of these adjudications, and the reasons for them, see 28d Ga. Rep., p. 498, *Candler vs. Hammond*.

The case being thus remanded the second time, counsel for

Hammond vs. Candler.

claimant amended their motion for a new trial, adding, as additional grounds—

1st. That the verdict was contrary to Law.

2d. That the verdict was contrary to evidence.

8d. That the deed or bill of sale executed by Thadens G. Holt to Thomas Butler, in the State of Georgia, conveying the negro Joe, was in violation of the laws and policy of the State, and in fraud thereof, as the said bill of sale was without consideration proceeding from Butler, but that the money paid belonged to Joe, and that said bill of sale was thus made for the purpose of procuring the emancipation of Joe, by enabling Butler to take him to New Jersey and then have him manumitted agreeably to the laws of that State, and with the view to enable said negro when thus and then emancipated to return to Georgia and to become domiciled again in this State.

This motion for a new trial, thus amended, came on to be heard before the Honorable HENRY G. LAMAR, at February Term, 1860, of Baldwin Superior Court, when, after argument, the presiding Judge granted the motion, and ordered a new trial. To which decision counsel for each party excepted, and assigns the same as error.

W. MCKINLY, for plaintiff in error.

KENAN & KENAN, *contra*.

By the Court—STEPHENS, J., delivering the opinion.

The sole point on which this case turns, is the status of this negro Joe. If he is a free man, these negroes who were bought with his money for him are subject to escheat under the Statute against the holding of slaves by free persons of color. But if he is himself a slave, the Statute does not apply. Whether (he being a slave) these slaves, who are his property, belong to his master, upon the idea that the master owns his slave and all that his slave owns; or whether they yet belong to the persons from whom Joe bought them, upon the idea that his purchase of them is void from want of capacity in him as a slave to make a contract, are questions not before us in this case. Our business is to decide whether or not they are subject to escheat, as being the property

Hammond vs. Chandler.

a free person of color. There is no difference nor dispute about the facts in the case. The only question is one of Law, as to the *status* of Joe under the facts. We think he is a slave. He was a slave in 1821, the property of Thaddeus G. Holt. It is contended that he is free, first by virtue of a manumission of him in New Jersey by one Butler, who had previously bought him from Holt. The evidence on this point leaves no doubt that the sale of him by Holt to Butler, and Butler's quick succeeding manumission of him in New Jersey, with Joe's immediate return thereafter to Georgia, were but the different steps in a plan for carrying Joe out of Georgia as a slave and bringing him back as a free man. It was a piece of machinery intended to evade our Statute against manumission, and we think it was void from the first step to the last in the series. The mischief at which the Statute was levelled, and which we think it has cut up root and branch, was the increase of a free-negro population in the State, by converting slaves into free negroes. This was the object of the Statute, and it declares that all conveyances or contrivances intended to evade its object shall be void. It would have been a perfectly legal transaction, if they had carried him out of the State and set him free outside, with a *bona fide* intention that he should remain out forever afterwards; but their intention from the beginning, that he should come back and be added to the free-negro population of Georgia, puts the sting of impotency and nullity into the whole proceeding, from the beginning to the end of it. The *status* of Joe is just what it was before the first step was taken in that scheme to have him added to the free-negro population of Georgia.

2. But it was contended that he was free by lapse of time, he having been registered as a freeman, and enjoyed the privileges of a free man ever since 1811. It is very clear that no Statute of Limitation is applicable to the case, and we are at a loss to know what Common Law principle can bar the owner from his right to a slave. Such a bar, instead of being found in our Law, would be at war with the very object of the Statute against manumission. Our Law does not allow conveyances, nor contrivances, nor time, to convert a slave into a free man in Georgia, to swell the ranks of a population which the Legislature has carefully guarded from increase from any source whatever, save that of procreation. Judgment affirmed.

ROWE vs. WARE.

1. In a suit against co-sureties, upon an issue of *non est factum* as to one of them, the others are not competent witnesses against him.
2. The signature of a sealed instrument by an agent, the principal not being present, is not binding on the principal, unless the authority of the agent be under seal.
3. No amount of errors will send a case back for a re-hearing, when a different verdict could not stand for want of evidence to support it. Errors in such a case are immaterial.

Debt on Guardian's Bond, in Wilkinson Superior Court. Tried before Judge HANSELL at April Term, 1860.

This was an action of Debt brought by Freeman H. Rowe, Ordinary of Laurens County, for the use of James A. Wright, a minor, against John M. Ware, principal, and Charles Hooks, Love Herndon, Bartlett W. Bell and James Taylor, securities, on a Guardianship Bond, given to said Ordinary for the faithful discharge of the duties of said John W. as guardian of James A. Wright, a minor child of John W. Wright, deceased. The declaration contained three assignments of breaches of the condition of said bond: 1st. That said John M. has failed to pay to the person lawfully authorized to receive the same, the estate and funds which he received belonging to said minor. 2d. That said John M. failed to make regular returns of his actings and doings as guardian aforesaid, as required by Law. 3d. That he failed and refused upon demand, to pay and turn over to Young J. Anderson, the present guardian of said minor, the funds and estate of said minor.

The bond is dated 3d July, 1854.

The defendants, Herndon and Hooks, pleaded *non est factum*—that they did not sign said bond, nor authorize any one to sign it for them—which plea or pleas, was verified by the oaths of the defendants respectively.

The Jury found the following verdict: "We the Jury find in favor of Charles Hooks and Love Herndon, with cost of suit as to them, and we find for the plaintiff, Freeman H. Rowe, Ordinary of Laurens County, for the use of James A. Wright, minor, the sum of two thousand eight hundred and ninety-nine dollars and ten cents, with cost of suit against

Rowe vs. Ware.

John M. Ware, principal, and Bartlett W. Bell security, this 6th April, 1860."

Taylor, it appeared, was not served with process, and no verdict or judgment was rendered against him.

Plaintiff moved for a new trial upon the following grounds:

1st. Because the Court erred in overruling plaintiff's motion for a continuance of the cause, on account of the absence of Bartlett W. Bell, one of the defendants who had been regularly subpoenaed in due time to obtain his attendance at this term of the Court, who was absent without the consent of plaintiff, and by whom he expected to prove that the defendant, Herndon, authorized James Taylor, a co-defendant, to sign his (Herndon's) name for him to the guardian bond—the Court holding that Bell, if present, would not be a competent witness.

2d. Because the Court erred in not allowing such parts of James Taylor's depositions to be read to the Jury as went to show that others of his co-defendants had authorized him to sign their names for them, and each of them, as securities to said bond.

3d. Because the Court erred in overruling the objection made by the plaintiff, to the testimony of a witness, John R. Cochran, that there was another guardian bond given in relation to the estate of the minor, James A. Wright, to-wit: a bond executed by James Taylor as his guardian. This objection was predicated upon the ground that if there was such other bond, that there was higher evidence of its existence, and that such evidence should be had, or a foundation laid for the introduction of secondary or weaker evidence.

4th. Because the Court erred in allowing the witness, Love Herndon, to prove that there was a note made by John M. Ware, upon which Hooks was liable as security—the note itself being the best evidence of that fact, and should be produced, or proof made of its loss or destruction, which was not done.

5th. Because the Court erred in charging the Jury, that an authority from the securities to sign their names to the guardian bond, must be in writing under seal, if they were not present at the execution of the deed.

6th. Because the Court erred in charging the Jury, that if the parties were not present at the time the bond was executed, and had not given authority under seal to some one to

Bonds as Wares.

"sign their name, then it required a writing by them under seal, to ratify the signature of their names to the bond by another, and in the absence of such ratification, it required some positive and definite act in relation to such signing of their names, and with a direct and certain reference thereto, to make it good against him, or to amount to a ratification of an unauthorized signing of their names. And further, that the Court erred in charging that "no such act was proven on the part of Charles Hooks from which the Jury could find that he had ratified the signing of his name, and that they must, therefore, find in his favor," there being some evidence to show that Hooks did recognize the validity of the bond, and his liability as security thereto.

7th. Because the verdict was contrary to Law.

8th. Because the verdict was contrary to evidence.

9th. Because the verdict was contrary to the weight of evidence.

The Court refused the motion for a new trial, and plaintiff excepted.

Y. J. ANDERSON & ELI CUMMING, for plaintiff in error.

DEGRAFFENREID & CARSWELL, contra.

By the Court.—STEPHENS, J., delivering the opinion.

1. Bell was not a competent witness against those sued as his co-sureties, on an issue of *non est factum*, for the direct effect of his testimony was to fix them as sureties with himself, and so divide and lessen his own liability. There was therefore, no error in refusing a continuance to get his evidence.

2. The same reason does not apply to Taylor, for he was not served, and therefore was not to be bound to anybody nor anybody bound to him by the judgment; but another reason which disposes of all the assignments of error, rendered his proposed testimony incompetent also. His evidence, which was ruled out, was only proof of a verbal authority to sign the bond. This Court has before held that an authority under seal is necessary to authorize an agent to sign a sealed instrument. Whether the rule be a reasonable one or not, is not the question, it is too firmly fixed in the Law to be

disturbed by Courts. It is a case for the Legislature only. But it was said that the bond need not have been under seal, though in point of fact it was so, and therefore the seal might be disregarded. Not so. The question was, whether Taylor had authority to sign the names of Hooks and Herndon to this bond as it is—*sealed* as it is. Whether a bond without a seal (to use for convenience, a short but inaccurate phrase,) would be valid, has nothing to do with the case, for there was no such paper in the case. If Taylor ever signed such an one, we know nothing of it. Was he legally authorized to sign this bond? is the question. He was not, and therefore this bond does not bind them.

3. Under this view it useless to consider the other assignments of error, for there was no evidence of authority to sign the bond, and a different verdict could not stand. No amount of errors will send a case back for a new trial when a different verdict, if rendered, would have to be set aside for want of evidence to support it. It is worse than useless to give an opportunity to do that, which being done, must be undone.

MORTON vs. PEARMAN.

1. Under the Act of Feb. 20th, 1854, as amended and interpreted by the Act of Dec. 12th, 1859, neither the Superior nor the Supreme Courts are required to grant a new trial in any case for an immaterial error, "or one not affecting the real merits of the case."

Attachment, in Jones Superior Court. Tried before Judge HARRIS, at April Term, 1860.

Sarah L. Pearman instituted her action, by attachment, against Ezra D. Morton for Breach of Marriage Promise—damages laid at five thousand dollars. The ground for suing at the attachment, as stated in the affidavit, was, that defen-

Morton vs. Pearman.

dant "absconded." Defendant appeared and traversed the truth of the affidavit, and denied that he absconded at the time said affidavit was made.

This issue was submitted to the Jury, who found for the plaintiff. Defendant moved for a new trial upon the following grounds:

1st. Because the Court erred in its definition of the word "absconded."

2d. Because the Court erred in its qualification of the charge requested by defendant's counsel, and his comments thereon.

3d. Because the Court erred in the remark made about the time the Jury was retiring.

4th. Because the verdict was contrary to Law and evidence, and the weight of evidence.

5th. Because the Court erred in admitting testimony that defendant had gone to Putnam County, and since had not been in Jones County, and that he now lived in Scriven or Effingham County.

The following is the charge of the presiding Judge referred to in the motion for a new trial:

The Judge said, that not finding a Law Dictionary by which he could give them the legal definition of the word "absconded," he would give them what he understood by it. The word absconded, while it might include concealment, meant something more: that a man might abscond without leaving the county; as when by absenting himself from home designedly to avoid personal service of a writ, or an arrest. He further illustrates the popular idea of the word by the case of a runaway negro, of whom it is usually said that he absconds or has absconded, though he has not left the county, but merely absented himself from home. He further charged, that the Jury were to consider the testimony, and if, from that, they were satisfied that defendant, being a single man, going about from place to place, with several places of residence, and being under a promise of marriage, they might presume that plaintiff had more reason for believing and swearing that he absconded, than if he had been a married man.

Defendant's counsel requested the Judge to charge, "The a man may be absent from home even for a week at a time, if on business, and intending to return, and a writ levied at his residence."

Motion *ex. Peerman.*

dence would be good service, and if they believed that such was the case here, then the attachment would not lie." To which the Judge replied, "Certainly, in a proper case he might be absent for a month or a year and not abscond," adding, "that there were three modes of commencing a suit: One by leaving a copy at the residence of defendant; another by personal service, and the third by attachment; and that they were to take into consideration all the circumstances of the case—the defendant being a single man, engaged to be married, having several places of residence, and if defendant has put himself in a condition where he could not have been served with bail process, then plaintiff has a right to sue out attachment."

As the Jury were about leaving their box, counsel for defendant observed, that he thought His Honor had presented the sole alternative of personal service or by attachment, and had left out the other alternative of leaving a copy at defendant's residence. To which His Honor replied, "but that is not this case."

The Court overruled the motion for a new trial, and counsel for defendant excepted.

JOHN RUTHERFORD & WM. T. MASSEY, for plaintiff in error.

Hardman
ISAAC HANCOCK, contra.

By the Court.—LUMPKIN, J., delivering the opinion.

I shall not pause to inquire whether or not there may not have been some slight misdirection by the Judge in this case. By the Act of 12th Dec., 1859, (*Pamphlet p. 48.*) it is declared that "the New Trial Act of 30th Feb., 1854, shall not be so construed as to require the Superior or Supreme Courts, or either of them, to grant a new trial in any case for an immaterial error, or error not affecting the real merits of the case."

Nothing short of the stringent provisions of the Act of 1854, thus happily amended, could have justified this, or any other Court, in granting a new trial in this case.

Mr. ~~John~~ D. Morton contracts to marry Miss Sarah J. Peerman on the twenty-fourth day of February, eighteen

Morton vs. Fearnes.

Hundred and fifty-nine. On the twentieth day of that month, four days before the nuptials were to have been celebrated, he causes Mr. Crawford Newton, at whose house he was staying, to write to Mr. Bryant, the brother-in-law of the young lady, the following letter, which he, Morton, dictated:

"Mr. Bryant—I take my pen in hand to inform you that Mr. Morton left my house to go to Arkansas; and I am sorry to say to you, that I think something is the matter with him more than common. A few weeks ago I thought he was getting along very well, and bid fair to be a business man. He has left his shop under my care, and all his business for collection. If he gets much worse, I think he will commit suicide, through disappointment. He often speaks of his sister and relatives, and a young lady up there somewhere, without calling any name. Who it is, I cannot tell. He thinks abundance of her from the way he talks. Whether he is disappointed in love, or missed his calculation, I cannot say. There is one thing I can say, something is the matter with him. I think he will come back in a month or such a matter. If he does not, I will let you hear from me again. I told him to write back to me how he got along, and the times, but he did not appear as though he cared much for anything. I am sorry to see him in the way he is.

"C. NEWTON."

This precious billet, worthy of the heads of the confederates who conceived and penned it, having been dispatched, Mr. Morton mounts his horse and puts off to Macon, leaving a negro woman and an old buggy in the hands of his host, Mr. Crawford Newton. The testimony, such as it is, shows that he was knocking about between East Macon and West Macon; for the first few days; ensuing the date of the foregoing epistle; engaged in horse-trading, and professing to be ailing part of the time.

One witness testifies, that he asked Mr. Morton the cause of his failing to attend and consummate his engagement? He answered, that he started and met Mr. John Stiles, and turned back and went to a fishing party! The same witness told him that he supposed he would have been in Arkansas by that time, from the letter Mr. Newton had written to S. J. Bryant. He replied, that he was sitting by Mr. Newton when he wrote that letter.

On the day after the marriage was to have taken place, Mr. Morton having disappeared from Jones, the county of his residence, and even his friend and confidant, Mr. Newton, not knowing his whereabouts, having left his house, as he swears, contemporaneously with the writing of the letter already quoted to go to Florida or Arkansas. This attachment was issued and levied on the defendant's negro and buggy, upon the ground that Ezra D. Morton "absconded." And was not this abundantly true as established by the testimony? The Jury could not have found otherwise than as they did. And it would have been manifest error in the Court to have granted a new trial, even conceding his authority to do so.

Judgment affirmed.

SPICER vs. YOPP et. al.

1. A verdict contrary to evidence must be set aside.

Complaint, in Laurens Superior Court. Tried before Judge HANSELL at October Term, 1859.

This was an action by Spicer, an Attorney at Law, against Yopp, administrator of B. H. Horn, deceased, brought to recover one hundred and eighty dollars, as counsel fees for services rendered in a claim case, wherein deceased was plaintiff in *£. fa.*, and James D. Hampton was defendant, and also claimant as trustee for his children.

Plea—General issue.

Plaintiff proved that he represented the plaintiff in the case; that his services were worth 10 per cent. upon the

Spicer vs. Yopp et al.

amount in controversy; that the amount involved was about \$1800. The fi. fa. which was offered in evidence had endorsed on it a transfer from Horn to defendant Hampton as trustee, expressed to be for value received, dated 10th March, 1856. Plaintiff further proved that he had been employed by Horn, and that the case was settled and arranged by Horn, taking some negroes from defendant, Hampton.

The Jury found for the plaintiff \$58 21 cents, who thereupon moved for a new trial on the following grounds:

1st. Because the verdict was contrary to Law and evidence.

2d. Because the verdict was contrary to the charge of the Court.

The presiding Judge refused the motion for a new trial, and plaintiff excepted, and assigned said refusal as error.

J. R. COCHRAN, for plaintiff in error.

H. M. MOORE, *contra*.

By the Court.—STEPHENS, J., delivering the opinion..

We are constrained to pronounce that the verdict is contrary to evidence. The plaintiff proved that he was employed in the case by the right person; that he rendered services in it, and (there being no special interest shown,) that his services were worth about one hundred and eighty dollars. There was no opposing proof, and not a suggestion why the plaintiff's proof was not worthy of credit. Yet the Jury gave a verdict for only \$58 21 cents.

Judgment reversed.

BONNER *et al.* vs. ANDREWS.

1. When the trustees of a *feme covert* have acquired a statutory title to slaves, as against the husband, can that title be defeated by a sale of the property to a third person by the husband, the purchaser having no notice of the plaintiff's title?
2. When the bill of exceptions is ambiguous upon an important point, upon which the case turns, and no argument has been submitted by counsel, it is the safer course to remand the cause for a new hearing.

Trover, in Putnam Superior Court. Tried before Judge HARRIS, at March Term, 1860.

This was an action of Trover brought by Oliver H. Bonner and Richard W. Bonner, trustees of Nancy C. Andrews, wife of James G. Andrews, against Davis R. Andrews, for the recovery of three negro slaves, to-wit: Ellen, a woman about twenty years of age, and her two children, Emma, about eighteen months old, and an infant named Lorenzo—all of the value of \$1,800.

The defendant pleaded the general issue.

The plaintiffs, in support of their title, offered in evidence the Will of James Bonner, deceased, the sixth item of which is as follows:

"I give and bequeath to my daughter, Nancy C. Brown, now Nancy C. Andrews, and the legitimate heirs of her body, the following property, to-wit: a woman named Polly and her three children, to-wit: Mary, Susan and Ellen; also, big Mary, having given her a mare, saddle and bridle," &c.

By the ninth item he appoints Oliver H. Bonner and Richard W. Bonner, his sons, his executors to carry into effect his Will. He also appoints trustees to carry into effect that part of his Will "in regard to the negroes given to his daughter, Nancy C. Andrews," &c.

This case was brought before this Court at November Term, 1858, (26 Ga. Rep., 520,) where it was held and decided that the foregoing clauses in the Will of James Bonner, deceased, did not create a separate estate in Mrs. Andrews, nor an estate to her and her children, but that the negroes vested in, or were given absolutely to her, and that the marital rights of her husband attached, who had the absolute title thereto, with power of sale, &c., and reversed the judgment of the Court below, and remanded the cause.

Bonner et al. vs. Andrews

The case again coming up for trial in the Court below, plaintiffs proposed, and undertook to obviate or avoid the force of the judgment of the Supreme Court, by proof that it was the intention of testator to create a separate estate in Mrs. Andrews and her children, and that the husband had recognized, acquiesced in, and acted upon this understanding, and that the trustees had taken possession and control of the negroes, and managed and used them as the separate estate for a period of time that would give them a title by operation of the Statute of Limitations. They proved by John L. Moore, who resided in Baldwin county, a demand upon defendant for the negroes and his refusal to deliver them up; that defendant purchased them from James G. Andrews for \$1,000; that defendant admitted that he had seen James Bonner's Will, and that he did not doubt that it was his intention to secure the property to Mrs. Andrews and her children; that Mrs. Andrews knew nothing of the sale of the negroes to him, defendant, until he went to pay for them, when he informed her of it. He then asked her playfully to sign the bill of sale, which she refused to do, but she said she had written to her brothers about it; when defendant replied to her, that he was glad of it, as it would save him the trouble of informing them. The plaintiff, Oliver H. P. Bonner, hired out the girl, Susan, in 1844, and the same year Polly was hired to Dr. Case, in Milledgeville; in 1858, Mrs. Andrews was at her mother's, in Baldwin county, and the negroes came to her there and remained the balance of that year, and witness understood them to be under the control of Oliver Bonner; never heard James G. Andrews say anything about the ownership of said negroes, and knows of no acts of ownership or control by Oliver H. P. Bonner, except his hiring of Susan to David Collins in 1844; James G. Andrews married in 1839; James Bonner died 4th July, 1841; the year after his marriage, Andrews had no settled home; he took possession of the negroes 1st January, 1841, when he went to house-keeping, about six months before old man Bonner's death; he settled about twelve or fourteen miles from his father-in-law; in 1840, he was at old man Bonner's part of the year; in 1841, lived in Jones county; in 1842, at old Mrs. Bonner's, in Baldwin county; in 1843, he went to Alabama, and returned to Georgia in 1844; in 1845, 1846 and 1847, he lived in Baldwin county; in 1849,

Bonner et al. vs. Andrews.

he went to Putnam; since then, don't know his place of abode; he took the negroes with him when he went to Alabama in 1848; no attempt made to prevent him taking the negroes to Alabama.

Plaintiffs then offered to prove by JAMES G. ANDREWS, the husband of *cestui que trust*, that he married in October, 1839, and that shortly thereafter old Mr. Bonner gave him certain negroes, (the same in controversy,) upon the understanding and agreement that he should hold them for the separate use of his wife; that he assented to this arrangement, and held them as the separate estate of his wife, after the making of the Will; that he was present when the Will was made, and heard a portion of it read, and a conversation about the settlement of the property between testator and the draftsman of the Will.

This testimony plaintiff proposed to introduce for the purpose of showing the circumstances and contemporaneous declarations, as throwing light upon, and ascertaining the intention of testator. The Court rejected the testimony, and plaintiffs excepted.

Plaintiffs then proposed to prove by said witness, James G. Andrews; that when he received said negroes from his father-in-law, that it was under a parol agreement, that he was to take and hold them in trust for the benefit of his wife and children, and that he assented to said arrangement, and that he held the negroes under this trust, and that the trustees named in the Will acted on this understanding, and from 1840 up to 1857, had hired out the negroes from time to time, taking notes for the hire.

The testimony was repelled by the Court, and counsel for plaintiffs excepted.

Plaintiffs then proposed to show that they had a title by possession, under and by virtue of the Statute of Limitations in this: that said trustees had exercised acts of ownership over the negroes adversely to the rights of the husband for fifteen years, by hiring them out, and that the husband had recognized their title during the whole of this period, and that defendant purchased the negroes with notice of all the facts in relation to the trust under the Will. This testimony the Court also repelled, holding that it was incompetent, unless they found that defendant had notice of the parol trust. To which ruling counsel for plaintiff excepted.

Benner et al. vs. Andrews.

The Jury found for the defendant; whereupon, counsel for plaintiffs tendered their bill of exceptions, assigning as error the rulings and decisions above stated and excepted to.

E. A. NISBET; JUNIUS WINFIELD, for plaintiffs in error.

GEO. T. BARTLETT, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The plaintiffs, by their counsel, offered to show that they had a statutory title to the negroes in dispute; that they had exercised acts of ownership over the property adverse to the rights of Andrews, the husband and the vendor of the defendant, for fifteen years, having hired out the property whenever they chose to do so, and having exercised various other acts of ownership, and that said Andrews had recognised the title of the plaintiffs during the whole of said period. They proposed, further, to show that the defendant, Davis R. Andrews, bought the property, which is the subject of the suit with notice of all the facts in relation to the trust under the Will; which motion was overruled by the Court, the Court holding that the evidence would be unavailable, unless the plaintiff should bring home to the defendant knowledge of the parol trust.

Suppose it be true, that the plaintiffs have acquired a complete statutory title to the slaves in controversy, as against James G. Andrews, is it necessary, to enable them to recover the property of his vendor, that he should have notice of their title, under which they claimed and exercised the right to control these negroes? The offer rejected by the Court concedes that he had notice of the supposed trust under the Will of old man Benner. True, this Court has decided that no sufficient trust was created by that instrument. If, however, the plaintiffs have held the property for fifteen years, under a parol trust adversely to James G. Andrews, can he defeat a statutory title thus acquired by selling the negroes to the defendant, with or without notice?

As no argument has been submitted upon this view of the case, and being uncertain whether we comprehend correctly the bill of exceptions as amended by the presiding Judge, touching this matter, we prefer to remand the cause for a rehearing.

Judgment reversed.

NEWSOME *et al.* vs. COGBURN.

J. N. having two sets of children, made a division of his whole estate into as many shares as he had children, and gave off to each of the older set an equal share of the same. Each of them receipted to him for the same, as is full, of their distributive shares in his estate. The balance left was the portion set apart for the younger set of children. After his death, on a bill filed by the administrator for instruction: *Held*, that the disposition so made by the estate, and agreed to by the older children, was good, and excluded them from any interest in the estate of the deceased.

In Equity, in Putnam Superior Court. Tried before Judge HARRIS, March Term, 1860.

This was a bill filed by John A. Cogburn, administrator of John Newsome, deceased, for direction as to the proper administration and distribution of the estate of his intestate.

The bill alleges that John Newsome departed this life in the year 1855, and that he left a Will, made 28th January, 1854, and which, after his death, was admitted to probate, and complainant duly qualified as executor thereof; that afterwards, said probate was set aside, and an intestacy declared by the Court of Ordinary, on the ground of the birth of a posthumous child, for which no provision was made in said Will. Complainant annexes a copy of said Will to his bill and makes it a part thereof; that after the revocation of his letters testamentary, complainant was appointed the administrator of said John Newsome, and took possession of his estate, and now holds the same ready for distribution as the Court shall adjudge, order and decree.

The bill then states that said John Newsome was twice married, and had children by both marriages; that in the year 1851, he had an appraisement and valuation made of his estate by three of his neighbors, and made a division thereof amongst his children, by both marriages, giving off and paying to his children by the first marriage, and the descendants of such child or children by said first marriage as were dead, their full share of his estate, and retaining in his hands the remainder of his property for the children of the last marriage; and upon the delivery of said property to his children by the first marriage, and the descendants of a deceased child, he took from them receipts, copies of which are

Newsome et al. vs. Cogburn.

set out below. The bill charges that the intestate intended said division and allotment to be final as to the children receiving the property, and they were to have no further share or interest in any estate which he should have or leave at his death, but the same should go to and vest exclusively in his wife and children by said second marriage, and that by the Will heretofore referred to, said Newsome gave the whole of his said estate to his second wife and her children—she taking a life-estate, and at her death, the whole to be divided amongst her said children.

The bill further states that the widow of deceased, who survived him, has since departed this life.

Defendant's children of the first marriage, by their answers, admitted the delivery to them of the property and money mentioned in said receipts, signed by them, but denied that it was intended to bar and preclude them from all further right or interest in the estate of their father, the said John Newsome, but the same were only advancements made to them by their father, and which they were willing to account for and bring into hotch-potch, and insisted upon their right to a distributive share of his estate.

Exhibit C. annexed to the bill and containing the receipts referred to.

"Received from John Newsome six negroes, (naming them,) and the same being all of the negro property of their equal and final distribution, and also received three hundred and seventy-seven dollars, of part of their portion, and there is five hundred and forty-five dollars that is yet to come when collected from Benjamin Ingram and Asa Zachary.

"January 9th, 1852.

(Signed)

"MOSES J. BARROW."

"Received of John Newsome, in full of all demand for the part of his estate coming to his daughter, Angeline Barrow. It being an equal and final distribution of said estate.

"February 13th, 1854."

(Signed)

"M. J. BARROW."

"GEORGIA, PUTNAM COUNTY:

"Received of John Newsome, as trustee for Joel Newsome and his children, the following negro slaves, viz: Sam, a fellow; James, a fellow; Mariah, a girl, and Jane, a girl

Newsome & al. vs. Cogburn.

which is his proportionate part of his father's estate, put in the undersigned in trust for his children.

"April 4th, 1855.

(Signed)

"M. J. BARROW."

"Received of John Newsome a negro woman by the name of Keniah, the same being all of the negro property, after an equal and final distribution, coming to the six youngest children of his daughter Mary Scott, the seventh and oldest child of said Mary Scott receiving her portion from said John Newsome. Also, four hundred and nine dollars and fifty cents in money, as part of the effects arising from the sale and final distribution of his land—the balance of the money coming to the six youngest children of his daughter Mary Scott amounting to four hundred and sixty-six dollars and eighty-one cents. I am to receive, when collected from Benjamin Ingram and Asa Zachary, the purchases of the land. All of said property and effects I receive as agent, in trust, for the six youngest children of said Mary Scott.

"December 30th, 1881.

(Signed)

"WM. J. SCOTT."

Then followed two other receipts by Scott, one for three hundred and twenty-one dollars, for his six youngest children, dated 7th April, 1853, and the other a receipt "in full of all demands for the part of his (Newsome's) estate coming to his daughter, Mary Scott, deceased, it being an equal and final distribution of said estate, I being agent in trust for Mary Scott, deceased," dated 1st January, 1854.

"Received of John Newsome two negro women by the names of Sakey and Poody, the same being all the negro property, after equal and special distribution, coming to myself. Also, four hundred and nine dollars and fifty cents in money, as a portion of the effects arising from the sale and final distribution of the land of said John Newsome, the balance of the money coming to me amounting to five hundred and forty-six dollars and twenty-nine cents. I am to receive, when collected from Benjamin Ingram and Asa Zachry, the purchases of said land.

"December 30th, 1851.

(Signed)

"MILLY BIRD."

Newsome et al. vs. Cogburn.

"Received of my father, John Newsome, two negroes, Boy and Likay, and one thousand dollars, in full of all my claim of my father's estate.

"August 9th, 1852.

(Signed)

"MILLY BIRD."

"Received of John Newsome one negro woman, by the name of Edy, and seventy-five dollars, it being my wife's proportionable seventh part of his estate, to his daughter, Mary Scott, deceased.

"January 1st, 1854.

(Signed)

"JOSEPH W. WALTON."

"GEORGIA, PUTNAM COUNTY:

"Received of John Newsome, my father, five negroes, &c. Also, received all of my proportionable part of my father's (John Newsome's) estate.

(Signed)

"JOEL NEWSOME."

Then follows a receipt from James Scott of a certain negro, "the same being all the negro property, after an equal and final distribution, coming to myself;" then money arising from the sale of the land.

Then a receipt from Dartch Newsome for six negroes and money, "being an equal and final distribution;" "all of said property I receive as a loan for my heirs, or heirs of my body from said John Newsome, my father," dated 1st January, 1853.

The Court below held that the effect of the receipts above set forth was to bar defendants from all further or future interest in, or claim to, any estate which John Newsome might leave at his death, and that they were entitled to no part of the estate in the hands of the administrator, but that the same was alone distributable amongst the children by the second marriage.

To which decision counsel for defendant excepted.

By the Court.—LYON, J., delivering the opinion.

Did the distribution made by John Newsome, the intestate in his life-time, to the children of his first marriage, at their acceptance of an equal share of his whole estate at th

time, on the terms expressed in their several receipts given for the same—that is, in full of all their claim or interest in his estate—exclude them from all farther participation in this estate? We think it did. The intestate intended that the portions respectively given and received by his older children should be in full of all present and future claim on his estate, and that the balance left should go to his younger children. That was his intention. The children so understood, and accepted the property on that condition. It was a fair and legitimate contract between all the parties. It is not pretended that the distribution was unequal, unfair, or fraudulent, or that if the property was all brought back and subjected to a new division that their respective shares would be increased. The practical and unnatural advantage that these parties propose to derive from defeating the intention of their father, is to keep the property they received, account for it in a division at its then value, and have an account of the property left in the hands of the intestate at his death, and which is the portion of the younger children under the contract, at its present increased value, so that the increase and increased value of that part of the property shall be the subject of general division, thus increasing their shares and diminishing that of the younger children. Such advantage would be unconscientious, unequitable, in violation of their contract, and cannot be allowed. We cannot see any good reason for disturbing this fair and just settlement. The release—if it be considered as a release, though it is not strictly so, but a settlement or contract—was to the father for the benefit of the releaser and the younger children. It is not objectionable because between parent and child, as no advantage was taken. Nor is it so because the thing released of the subject of contract was a bare expectancy or probability. “Contingent interests and expectancies may not only be assigned in Equity, but they may also be the subject of a contract, such as a contract of sale, when made for a valuable consideration, which Courts of Equity, after the event has happened, will enforce. So even the naked probability or expectancy of an heir, to his ancestor’s estate, may become the subject of a contract of sale or settlement; and in such cases, if made *bona fide* for a valuable consideration, it will be enforced in Equity after the death of the ancestors, not, indeed, as a trust attaching to the estate, but as a right of

Davis vs. Davis.

contract. *Story Eq.*, §1040 L; *Wright vs. Wright*, 1 *McC.* *Gr.*, 400. The same principle is recognized by this Court in *Dugas vs. Lawrence*, 19 *Ga.*, 559.

Judgment affirmed.

DAVIS vs. DAVIS.

1. The purchase of negroes belonging to the estate of a deceased person, from any body whatever, before administration is taken on the estate, amounts to a conversion by the purchaser, and authorizes the administrator, when one is afterwards appointed, to recover of the purchaser, not only the negroes, but their hire from the time of the purchase.

Case, in Putnam Superior Court. Tried before Judge HARRIS, at March Term, 1860.

This was an action brought by Sidney C. Davis, administrator with the Will annexed of Shadrack Floyd, deceased, against Thomas J. Davis, executor of the last Will and testament of Asa Zachary, deceased, to recover the value or compensation for the use and labor of two negro slaves, Kitt and Dave, held and enjoyed by defendant's testator from 1847 to 1858, or 1854, and which slaves belonged to plaintiff as administrator aforesaid.

The facts of this case are about as follows:

Shadrack Floyd, deceased, by the 4th item of his last Will and testament, bequeathed and devised certain property to his wife, Martha Floyd, during her natural life. By the 7th item he says: "It is further my Will and desire that after the death of my wife, Martha, the whole of my estate not hereinbefore disposed of shall be sold at twelve months credit and good security taken, in such lots as will likely bring the most money, and divide equally among my children that may

Davis vs. Davis.

be in life at that time, and if there should be any one or more of my children not living at the death of my wife, but leaving legitimate issue, all such children shall receive the portion their father or mother would have been entitled to by this Will."

After Floyd's death, his wife retained the property bequeathed to her for life, and the executors appointed by said Will never qualified; and the estate being thus unrepresented, the said Martha, on the 3d day of January, 1845, sold two of the slaves bequeathed to her for life, to-wit: Kitt and Dave, to Asa Zachary, defendant's testator, and executed to him bills of sale for the same. She undertook to sell the said negroes absolutely, receiving for Kitt five hundred dollars, and for Dave six hundred dollars. Zachary took possession of the negroes and held them until his death, about 1853. Mrs. Floyd, the tenant for life, died in 1847. After Zachary's death, plaintiff took out letters of administration, with the Will annexed, on Shadrack Floyd's estate, and brought an action of Trover against Thomas J. Davis, (who was the executor of Asa Zachary, and in possession of the negroes,) for said negroes. The action was against Davis individually, and not against him as executor, and recovered said slaves, and their hire from 1853 to the time of the trial, about 1856. Afterwards, plaintiff brought this action against Davis, as executor of Zachary, to recover the value of said negroes, or compensation for their use and labor from 1847 up to 1853, the time they were held by testator, and for which period no hire or compensation was recovered in the first action of Trover.

Defendant, amongst other pleas, pleaded the verdict and judgment in the former action of Trover, as a bar to any further recovery.

No point was made on the testimony; which being closed, counsel for defendant requested the Court to charge the Jury as follows:

1st. That if they believed that Zachary was properly in the possession of the negroes at the termination of the life-estate, then he was not liable for hire until he had an opportunity to turn them over legally, unless the plaintiff shows that he used them or got some benefit from them.

Which charge the Court refused to give, and defendant excepted.

Davis vs. Davis.

2d. That Zachary was not required to drive the negroes off and abandon them, when there was no person entitled, in Law, to receive them, to save himself from the payment of hire. This request the Court refused to charge, and defendant excepted.

3d. That if Zachary had the negroes in possession at the death of the life-tenant, it was his duty to hold them ready, and surrender them to the true owner when he should appear; and unless it has been shown that he did otherwise, his estate is not liable for hire.

This charge the Court refused to give, and defendant excepted.

4th. That any refusal of defendant, Davis, to surrender the negroes, after the death of Zachary, does not affect Zachary's estate.

This the Court refused, and defendant excepted.

5th. That to enable plaintiff to recover, it must appear that Zachary was in life at the death of the tenant for life.

Which charge the Court refused to give, and defendant excepted.

6th. That if the Jury believe that the legatees of Shadrack Floyd got the benefit of the purchase money of the negroes, they are not entitled to recover the hire, though said sale was irregular, especially if they know of the sale and acquiesced in it.

Which the Court refused to give, on the ground that there was no testimony to authorize such charge, and counsel for defendant excepted.

The Court then charged the Jury, that the remaindermen under the Will of Shadrack Floyd, deceased, were authorized to receive the property at the death of the tenant for life, and that it was the duty of Zachary to deliver the property to them. Counsel for defendant asked the Court to add; that if the remaindermen had the right to recover the property at the death of the life-tenant, then the Statute of Limitations commenced to run at that time. Which additional charge the Court refused to give, holding, that it was the duty of Zachary to hunt up the remaindermen, or force an administration on Floyd's estate. To which charge and refusal to charge, counsel for defendant excepted.

The Jury found for the plaintiff fourteen hundred and thirty-seven dollars and fifty cents.

Whereupon, counsel for defendant tenders his bill of exceptions, assigning as error the charges and refusals to charge above stated and excepted to.

N. G. FOSTER, represented by AUGUSTUS BREAR, for plaintiff in error.

JUNIUS WINGFIELD, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

It is useless to consider separately all the charges which were requested and refused in this case; for a single view shows that they were all properly refused. Mrs. Floyd had no authority to sell these negroes, because even her life-estate in them was not valid without an administration upon Floyd's estate; and when she sold them she was guilty of a conversion, and when Zachary bought them from her, he was guilty of a conversion, to the injury of Floyd's estate, and Floyd's administrator was the person to recover damages for the injury. The charges asked and refused all turn upon the supposed necessity of some *further* conversion, before the plaintiff could recover. *One* conversion by the defendant is enough to maintain the action of Trover, and there was one very unequivocal one in this case, when Zachary bought and applied to his own use the negroes of Floyd's estate, from a person who had no power to sell them. The plaintiff, in strict law, might have recovered the hire from the time of Zachary's purchase; but he very properly, under the facts, declined to demand it except from the death of Mrs. Floyd, when her imperfect title under the Will ceased. We deem it scarcely necessary to add, that no judgment against Davis; as an individual, could protect him from a recovery against him as executor.

Judgment affirmed.

GRIFFIN vs. SKETOE.

GRIFFIN vs. SKETOE.



A verdict and judgment was obtained at Common Law for the defendant, in a statutory form of action, for a lot of land. The Statute of Limitations having been relied on and supported in the trial by a deed ante-dated eight years, without which the recovery could not have been had, one of the witnesses to the deed swearing that the deed was made at its apparent date. A bill was filed by the plaintiff to restrain the defendant from using such judgment so fraudulently obtained as a bar to a subsequent action for the same lot: *Held*—

1. That it was not necessary to allege in the bill or prove that the witness swearing falsely had been prosecuted to conviction for perjury, under the provision of 8th sec. 8th div. Penal Code; that the case did not fall within its provision, nor was affected by it.
2. That although the bill showed that defendant had been in actual possession of a part of the lot more than seven years before the commencement of the suit, still, the verdict on the entire lot could not be maintained without the deed.
3. That a Court of Equity will grant relief against a judgment obtained by fraud, as the judgment in this case was.
4. In matters of fraud, the party aggrieved has a right to go into either a Court of Equity or Law for relief, and having gone into Equity, he cannot be sent back to a Court of Law, although his remedy there might be equally adequate.
5. Injunction is a proper remedy to stay waste in cutting down and selling from the lot the valuable timber thereof.

In Equity, in Jones Superior Court. Decision on Demurrer by Judge HARRIS, at April Term, 1860.

This was a bill in Equity by Eli S. Griffin, administrator of Abraham Williams, deceased, against Garry Sketo, and its object was to remove certain legal impediments to the prosecution of an action of ejectment pending at Law by complainant against defendant.

The bill states, in substance, that complainant's intestate, in his life-time, brought suit against defendant for the lot of land in controversy; that the action was under the statutory form prescribed by the Act of 1847, and upon the trial there was a verdict for defendant; that afterwards, intestate again commenced his fictitious action of ejectment against defendant for the same land, and before trial, departed this life, and that complainant, as his administrator, has been made a party thereto; that to this action of ejectment defendant has plead-

ed former recovery, and complainant is advised that said plea, under the decisions and adjudications of the Supreme Court of this State, is a bar to complainant's right to recover in the pending suit.

The bill further alleges, that the verdict in said first action, in favor of defendant, was obtained by the false swearing and perjury of a witness, who testified on said former trial that the deed upon which defendant relied as color of title, was executed at the time it purported to be dated, to-wit: in 1842, when, in fact, said deed was executed in 1849, and was thus falsely and fraudulently ante-dated to sustain defendant's plea of the Statute of Limitations, pleaded in said case, and by reason of which he succeeded in defeating the claim of complainant's intestate, and obtained a verdict, and which he now pleads in bar of the pending action; that these facts have come to the knowledge of complainant and his counsel since the trial of the former action, at which time they were ignorant of the same, but which they could now prove and establish, if they were permitted to do so, but which complainant is advised he would not be allowed to do, or even if proved, would not, under the strict rules of Law, be sufficient to overcome defendant's plea of former recovery.

The bill prays that the verdict and judgment in the former action be set aside and annulled as having been obtained by fraud and perjury, or that this Court order and decree, that notwithstanding said verdict and judgment, complainant, on the trial of the action of ejectment, be permitted and allowed to prove the facts above stated in reference to said deed, and that he shall not be precluded and prevented from so doing by reason of said verdict and judgment. There was also a prayer for an injunction to restrain defendant from cutting timber and committing waste upon the premises pending the action at Law.

To this bill defendant demurred, upon the grounds—

1st. That there was no Equity in the bill.

2d. Because complainant does not allege in his bill that defendant did not rely or recover on some other title than the deed, charged to be fraudulent

3d. Because complainant does not allege in said bill that he has prosecuted and convicted the witness referred to of perjury, and by whose false and fraudulent testimony said verdict was obtained.

Griffin vs. Skates.

After argument, the Court sustained the demurrer and dismissed the bill. To which ruling and decision counsel for complainant excepted.

JOHN RUTHERFORD, for plaintiff in error.

KENAN & DEGRAFFENREID, *contra*.

By the Court.—LYON, J., delivering the opinion.

This bill is filed for two purposes :

1st. To be relieved from the effect of a judgment heretofore rendered between the same parties, for the same lot of land, on the ground that the judgment was obtained by fraud.

2d. To restrain the defendant from committing waste on the lot in controversy, by cutting and removing timber therefrom.

The defendant demurs to the bill on three grounds, which we will dispose of in the inverse order to that stated in the demurrer.

1. Was it necessary to allege in the bill that the witness, who is charged to have sworn falsely on the former trial, when the verdict was had which is complained of, had been convicted of perjury, before the relief prayed for could be granted, so far as to set aside that judgment? The *8th sec. 8th Art. of the Penal Code, Cobb, 804*, provides, that a "judgment obtained by perjury shall, on motion, be set aside, if the person charged with such perjury shall have been duly convicted; and it shall also appear that such judgment could not have been obtained without the evidence of such person." It is stated in the bill that Pitman, who was a subscribing witness, as a Justice of the Peace, to the deed on which defendant relied, did, on the trial when the verdict complained of was had, falsely swear that the deed was executed on the day it bore date. That, however, is but one circumstance in the chain of events which constitutes the fraud to be relieved against. The verdict itself might, and, in all probability, would have been obtained, whether this witness was sworn or not. The execution of the deed to which this testimony went might have been otherwise proven; in fact, the deed had been admitted to record; it could have been read in evidence without further proof. That deed and the proof of sever

years possession of the lot named in it secured the verdict. What use, then, for a conviction of the witness? How would the complainant be benefitted by such conviction? The bill is not filed on that idea, but for relief on the ground that the verdict was obtained by the fraudulent conduct of the defendant in procuring and putting in evidence a deed to himself for the land, purporting to be made in 1841, when, in fact, it was not made until 1849, and without which the verdict could not have been obtained. Therefore, the case does not fall within the provisions of that section of the Penal Code, nor is it controlled or affected thereby.

The second ground of demurrer, that is, "that the bill does not show that the defendant did not recover on some other title paper than the deed set forth in complainant's bill as fraudulent," is not supported by the fact. On the contrary, we find that fact very fully and sufficiently stated in the following extract: "It was alone by virtue of said pretended deed, and the fraudulent use made of it in said first suit, that Sketoe obtained his verdict; indeed, Sketoe could not have recovered without color of title, running with the seven years possession, at least, as to the land not in actual occupancy, which constitutes four-fifths of the lot, and that said pretended deed was the only writing or species of paper title relied on in said trial."

Was there Equity in the bill? It is argued that there was not,

1. Because the allegations in the bill show that defendant was in the actual possession of the lot more than seven years before the commencement of the suit in which the verdict was obtained, and that, therefore, the verdict ought to have been for the defendant, independently of the proof made by the deed; that is, if the deed had not been put in evidence at all, still the verdict ought to have been for the defendant. That this possession rested in the defendant a complete statutory title, paramount to the paper title of the plaintiff. If the verdict had been for the defendant, as to such part of the lot only, as he had held in actual occupancy under claim of right, (if such was the fact,) for seven years previously to the institution of the suit, then there would have been something in this position of counsel; but such was not the fact.

2. The issue involved in that trial was the title to the whole lot. The possessory title of defendant went to a part only of

Griffin vs. Sketos.

the lot. It could be set up and maintained only to the extent of the possession, not one foot beyond. *Conyers vs. Kennan*, 4 Geo. 814; *Royal vs. Lisle*, 15 Geo. 545; *Morrison vs. Hays*, 19 Geo. 249. The verdict was a general one for defendant, extending to the entire lot; and it is now relied on as a bar to the recovery of every part of the lot by the plaintiff. Such verdict could not have been had without the deed, and it therefore depends upon the deed.

8. It is furthermore urged that the complainant had an adequate Common Law remedy, which he must avail himself of before he can be heard in this Court.

Is this so? The facts are, that complainant's intestate commenced suit at the October Term, 1850, of Jones Superior Court, for the recovery of lot of Land No. 48, in the 6th district of that county, against one, whom he supposed to be a mere squatter. In March, 1851, while that suit was pending, the defendant put on record a deed, purporting to have been made in 1841, from one John Smith, a person, who seems to have no connection with the title whatever, to himself. That deed was not made until 1849. On the trial, defendant pleads and proves seven years possession of the land under color and claim of title, which is evidenced by the deed. Whatever suspicions the plaintiff may have had as to the *bona fides* of that deed, from the fact that it was dated in 1841, and not recorded until 1851, as well as the source from which it originated, were lulled to sleep, and overcome by the oath of Pitman, the Justice of the Peace, who was a witness to the deed; that the deed was made at the time it purported. Upon this proof, a recovery was had for the defendant. The plaintiff acting on the idea that was prevalent with the profession, that a judgment on the statutory form of Action for land, like that of Ejectment, was no bar to a second action, instituted a second suit for the premises. Pending this last suit, the question was definitely settled, that a recovery, under the statutory form of action for land, constituted a complete bar to any other action between the same parties for the same premises. *Sims vs. Smith*, 19 Geo. 125. The defendant, to avail himself of the adjudication, plead his judgment in bar of the last suit. A judgment obtained by the most false and fraudulent, if not *criminal practice*, in which truth and justice were circumvented, and the Court of Law made to speak a falsehood! By that judgment, never-

theless, the complainant is absolutely bound so long as it remains a judgment. He cannot impeach it collaterally on the trial of the case at Law, even for the fraud. 1 *Phil. on Ev.* 346; *Prudham vs. Phillips*, *Ambler* 763. Shall the defendant be allowed to avail himself of this advantage thus wrongfully obtained.

3. That a Court of Equity can grant the relief is very clear, for in matters of fraud, Courts of Equity and of Law have concurrent jurisdiction. Lord Redesdale in *Bateman vs. Willoe*, 1 *Sch. & Le.* 205, says, "When a verdict has been obtained by fraud, or whenever a party has possessed himself, improperly of something, by means of which he has an unconscientious advantage, Equity will either put it out of the way or restrain the party from using it." And that it is just what this complainant asks for in this case. Counsel for defendant does not controvert this principle. His position is, that the Court of Law, in which the judgement complained of was obtained, has jurisdiction of the question and can give the desired relief, by reversing or vacating the judgment for fraud in a proceeding instituted for that purpose, that that is the Court in which the complainant *must* seek redress.

4. That position is not maintainable, for whenever Courts of Law and Equity have concurrent jurisdiction of a question, as in this case, that Court, which first gets hold of the case, will retain it. It is at the option of the party aggrieved to go into a Court of Equity or Law. This party has come into a Court of Equity. It was his right to do so, and we cannot turn him away. *Smith vs. Gettinger*, 3 *Kelly* 145. And we hold that adjudication to be conclusive on this Court. If other authority was necessary to support this bill we have it. Lord Hardwicke in *Barnesly vs. Powell*, 1 *Ves. Sr.* 288, discussing a similar, if not the identical question, says, "though this Court cannot set aside a judgement of a Common Law Court obtained against conscience, yet it will decree the party to acknowledge satisfaction on that judgment though he has received nothing, because obtained when nothing was due, so it cannot set aside a fine for being obtained by fraud and imposition, as the Court of C. B. to a certain extent, and with certain restrictions may. Yet on a conveyance so obtained, this Court never sent the plaintiff to C. B. to set it aside, but considers the person so obtaining the estate even a fine, as a trustee, and decrees him to re-convey on the

Matthewson *et al.* vs. Jones.

general ground of laying hold of the ill conscience of the party, to make him do what is necessary to restore matters as before." So we think there was Equity in the bill.

5. The complainant was entitled to the injunction prayed for in his bill, to stay the waste of defendant in cutting down and selling from the lot the valuable timber thereof. *Smith vs. the City of Rome and authorities cited.*

The judgment of the Court below dismissing the bill on demurrer must be reversed.

Judgment reversed.

MATHEWSON *et al.* vs. JONES.

1. If the payee of a note, to induce one to become a security thereon, represents that he has in his hands funds belonging to the principal, which shall be applied as a credit upon the note, the security may give parol evidence of the payee's promise; and if established by the proof, he is entitled to the benefit of said assurance.

Complaint, in Pulaski Superior Court. Tried before the Honorable A. H. HANSELL, at April Term, 1860.

This was an action by Lewis Jones, bearer, against Darius R. Mathewson, Thomas D. L. Ryan and John H. Oakley, on the following promissory note:

"\$2,010.

"By the 25th day of December next, we, or either of us, promise to pay Charles E. Clark, or bearer, two thousand and ten dollars, with interest from date. Value received.

"February 18th, 1858.

(Signed)

"D. R. MATHEWSON,
"THOMAS D. L. RYAN,
"J. HENRY OAKLEY."

Mathewson et al. vs. Jones.

With the following credit endorsed: "Received, December 14th, 1858, of Dr. D. R. Mathewson, sixty-five dollars on the within note."

The defendants pleaded the general issue. Mathewson, one of the defendants, further pleaded, that he was only surety to said note, and had been induced by Clark, the payee, to become surety, by representing to defendant that there was a settlement to be had between him, Clark and Ryan of their partnership accounts, and that there would be due and coming to Ryan about four hundred and fifty dollars, and which he assured and promised defendant should be applied to, and credited on said note; and that it was upon this representation and assurance that he became surety, and that said representation was false, and that no such amount has ever been applied or credited upon said note, and that plaintiff had notice of these facts before he traded for said note, and became the owner thereof with full knowledge of this defense.

At the trial, plaintiff moved to strike said last-mentioned plea. The Court granted the motion and struck the plea, and defendant excepted.

The Jury found for the plaintiff the full amount of the note, minus sixty-five dollars, credited thereon. Whereupon, defendant tenders his bill of exceptions, assigning as error the aforesaid decision.

DAWSON & KIBBE, for plaintiffs in error.

SCARBOROUGH & LOWRY, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We do not think the rule which excludes parol testimony from adding to a written contract applicable to this case. The payee of the note, to induce Darius R. Mathewson to sign the note sued on, assures him, as the plea states, that he had in his hands four hundred and fifty dollars, which would be coming to Thomas D. L. Ryan, the principal in the note, upon the settlement of their medical copartnership, which amount should be credited upon the note, and that upon this representation he acceded to the contract; all of

Mason et al. vs. Deese.

which was well known to Lewis Jones, the plaintiff in the action.

Is not Mathewson entitled to this credit? Would it not be a fraud to withhold it? Either the payee has realized this sum, or he has not. If he holds it, he is bound to apply it to Ryan's debt; and if he surrenders it up and the security is thereby prejudiced, the loss must fall upon Clark or Jones, the bearer. If he made a false representation or was even mistaken as to the matter, it is equally certain that the security will be protected.

Our conclusion, consequently, is, that the plea should not have been stricken, and that if sustained by the proof, the defendant is entitled to claim the relief which he seeks.

MASON *et al.* vs. DEESE.

1. A marriage settlement which provides that the wife's property and its proceeds shall "*never*" be subject to the control nor the contracts of the husband, seems to intend his exclusion after the death of the wife, as well as during her life; but it may be submitted to a Jury to be construed in the light of the circumstances which surround the parties at the time of the marriage.

In Equity, in Wilkinson Superior Court. Tried before Judge HANSELL, at April Term, 1860.

This was a bill brought by James Mason, as administrator of Susan Lowe, formerly Susan Mason, deceased, and the other plaintiffs in error as her brothers and sisters, and heirs at Law against Joel Deese, as administrator of Lunsford Lowe, deceased, the husband of said Susan. The substance of the case made by the bill is, that the said Lunsford and Susan intermarried, first executing a marriage settlement which is as follows:

"GEORGIA, LAURENS COUNTY:

"This indenture tripartite made and entered into this 5th day of April, in the year of our Lord one thousand eight hundred and forty-five, between Susan Mason, Lunsford Lowe, and James Mason, trustee of and for Susan Mason, as follows: Whereas a marriage by Divine Providence is contemplated to be had and solemnized in a short time between the said Susan Mason and the said Lunsford Lowe; and whereas the said Susan Mason is seized and possessed, in her own right, of some valuable property, to-wit: a stock of neat cattle, and as one of the legatees of Turner Mason, her deceased father, she is entitled to a considerable property, both real and personal, consisting of lands, negro slaves and other personal property to a large amount, the value of which cannot at present be ascertained, but it is expressly understood and agreed that so soon as a division of the estate shall be had, that a schedule of the part of the said estate that shall or will fall to the said Susan Mason shall be annexed to, and form a part of this settlement and agreement. Now, in order to secure for the sole and separate use of the said property to the said Susan Mason, in the event that the said contemplated marriage does take place the said Susan Mason, by and with the consent of the said Lunsford Lowe, which is evinced by his becoming a party to the agreement and settlement, and signing the same, in consideration of the said contemplated marriage, and for the further consideration of five dollars to her in hand well and truly paid by the said James Mason, at and before the sealing and delivery of these presents, the receipts whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell, alien, convey and confirm unto the said James Mason, and his heirs and executors, all the before mentioned stock of neat cattle, the artificial marks of which, and the number of which, when ascertained, shall be annexed, by way of schedule, to this agreement and settlement; also, the legacy which is left to the said Susan by the last Will and testament of her said father, Turner Mason, which, when assigned and turned over to her by the executor of the said testator, shall also be annexed, by way of schedule, to this agreement, and shall form a part and parcel thereof, and the same is to be held by the said James Mason and his heirs and executors upon the following trusts, stipulations and

conditions of, and concerning the same, as follows, to-wit: that the said property nor any part thereof, or the proceeds, profits or hire thereof is ~~never~~ to be subject to the control, contracts or liabilities of the said Lunsford Lowe heretofore made or entered into by him, and also upon the further trust and condition that the said property, and every part and parcel thereof, shall remain in the possession of the said Susan and the said Lunsford Lowe, in the event that the said marriage shall take place, and that she shall also have, take and appropriate the proceeds, hire and profits thereof in such manner as she shall deem fit and proper for the support, comfort and maintenance of herself and her family, including the said Lunsford Lowe during their joint natural lives and living together, and also upon the further trust and condition that after the death of the said Susan, in the event that she shall leave a child or children by the said marriage, then the said property and every part and parcel thereof shall go to and vest in the said child or children in *fee simple*; and upon the further trust and condition that, in the event there shall be no child or children of the said marriage, then the said Susan shall have the right to dispose of the said property by deed or by last Will and testament, or in such mode as she may adopt, which shall not, however, take effect or deprive her of the possession of the said property during the term of her natural life; and also upon the further trust and condition that in the event that at any future time it may be deemed proper by the said Susan that a part or portion of the said property should be sold for the purpose of supporting and maintaining the said Susan and her family, or for changing the said property and investing the proceeds of the same in other property which the said Susan might deem more suitable or profitable, then she shall have the right to do so, by the consent of the said James Mason, and the deed in writing of the said Susan and the said James Mason shall be a sufficient conveyance of the said property, and the property so purchased with the proceeds of the property so sold, shall be held in the same manner, and be subject to the same conditions and limitations as that hereinbefore conveyed, and the said Lunsford Lowe covenants, promises and agrees that he will exercise no greater power or authority over the property hereinbefore conveyed than he is authorized and permitted to do by this settlement and agreement, and the said

James Mason, trustee, promises and agrees, on his part, that he will faithfully execute, perform and fulfill all things hereinbefore agreed to be performed and done on his part.

"In testimony whereof, the said Susan Mason, Lunsford Lowe and James Mason have hereunto set their hands and affixed their seals the day and year first above written.

"Signed, sealed and delivered in presence of

"REBECCA DAVIS,	} SUSAN MASON, [L.S.]	
"WILLIAM A. J. ^{his} BRITT,		L. LOWE, [L.S.]
^{mark}		JAMES MASON. [L.S.]
"JACOB T. LINDER, J. P.		

"GEORGIA,	} Clerk's office Superior Court, re-	
"LAURENS COUNTY:		corded in book C, pages 180, 181,
		182 and 183. Sept. 17th, 1845.

"FRANCIS THOMAS, Clerk."

It is further alleged that Lowe was insolvent at the time of the marriage, and that his insolvency was one of the reasons for the settlement. The allegations further are, that the wife died, leaving the husband surviving her; that he then died, and the defendant, Deese, took out letters of administration upon his estate, and under that authority took into his possession, as the property of his intestate, the negroes and other property which was covered by the settlement, and sold the negroes under an order at public outcry, but had some of them bought in for his own use. Also, that said Deese had possession of the title papers of the real estate covered by the settlement. The prayer of the bill was for a discovery of the defendant's acts in relation to the property and of the amount of the notes which the complainants alleged they did not know, and that he might be decreed to deliver up the title papers, and account fully for all the property covered by the marriage settlement with the complainants as administrator and heirs at Law of the deceased wife, Susan Lowe. There was a general demurrer to this bill, and the Court, on the hearing, dismissed the bill for want of Equity. The complainants excepted, and assign the decision as error.

Y. J. ANDERSON; E. A. & J. A. NISBET; and JUNIUS WINGFIELD, for plaintiffs in error.

H. M. MOORE; A. E. COCHRAN, and S. T. BAILEY, for defendants in error.

By the Court.—STEPHENS, J. delivering the opinion.

The sole question in this case is, whether or not it was the *intention* of this settlement to exclude the husband from his marital rights after the death of his wife? The words of the exclusion constitute the first trust or condition declared by the settlement, and are as follows: "The said property nor any part thereof, or the proceeds, profits or hire thereof, is never to be subject to the control, contracts or liabilities of the said Lunsford Lowe, heretofore made or entered into by him, or that shall hereafter be made or entered into by him." By these terms, from *what*, or how much is he excluded, and during *what time*, or how long is he excluded? It was suggested that these terms fail to effect any exclusion at all—upon the idea that their real intention was, not the lawful one of excluding the interest which the husband would acquire by the marriage, but the unlawful one of protecting that interest from his debts, and that the intention being illegal, must fail. It is true, that the form of phraseology indicates that the parties were looking to the security of the property from the husband's debts, as a leading purpose, but the plain legal effect of the language used, is the complete exclusion of his interest during whatever period the exclusion operates. The property is saved from his *control*, as well as his contracts, and is guarded against *him* as well as against his creditors. He who has no *control* over a thing, nor any power of subjecting it to his contracts or liabilities, has no *property* in that thing. Take away these, and I know not anything that is left. The words used effectually negative the husband's interest, and there are no other words to contradict or qualify them. To conclude that an interest was intended to be left in him during the period in which this clause is to have effect, is to impute an intention to the parties upon a mere surmise, in opposition to the plain effect of the words which they have used to express their intention. The exclusion is complete so long as it lasts. During *what time*, or how long does it operate? It is clear, that the literal sense of the terms excludes him forever, as well after the death of his wife as during her life; for the *property*.

corpus and proceeds, is *never* to be his. But it is said that this being the conceded literal sense of these words, they must be construed in the light of, and restrained by, the preceding words, which declare the object of the settlement to be the securing of the property to the sole and separate use of the wife. It is said that this purpose being declared in *limine*, must be regarded as a general intent covering and limiting the scope of the whole instrument, and that this general intent being itself confined in its operation to the life-time of the wife, confines the operation of all the provisions within the same period. This position is untenable, because it is in plain conflict with one of the clearest and most important provisions in the whole settlement—the provision for the issue of the marriage. This provision, so far from being confined in its operation to the life-time of the wife, as the argument requires that it should be, begins its operation only after her death. This proves that what is claimed as a general intent covering and limiting all the provisions of the settlement, is not what it is claimed to be. It *fails* to cover one of the leading and most clearly expressed purposes of the settlement; and failing to cover one, may it not fail to cover another? One clear failure breaks down the reliability of that clause, as a guide in the construction. This, therefore, is no reason, nor does any other reason occur to me, for cutting down and limiting the literal and natural force of the word “never.” On the contrary, it seems to me that this word must have its full force, operating after the death of the wife as well as during her life, in order to give meaning to all the parts of the settlement. This exclusion which receives great prominence from being placed *first*, was wholly useless, unless it was intended to have effect after the death of the wife; for the very next clause secures the sole and separate use of the property to *her* and her family (including him so long as he may continue a member of her family) during her life, and thus, by a single provision, exhausts the alleged general intent. Again, the last thing which the husband did was to covenant that he would exercise no greater power or authority over the property than he was *authorized* to do by the settlement—not by the *marriage* as regulated by the settlement, but by the settlement itself. He was to do nothing, unless *empowered* by the settlement. This induces, to my mind, that the parties considered that they had

Mason et al. vs. Deese.

established the basis of total exclusion in the first place, and that all which the husband could take, was to come by being expressed and conferred in subsequent clauses of the settlement, and not come as an unbarred *residuum* of marital rights. The settlement does confer on him two benefits: the provision for his support so long as he might continue a member of his wife's family by living with her, and the *chance* of being her legatee in the event of her dying without issue. The value of that chance depended very much, if not wholly, upon his solvency or insolvency at the time when the wife should come to exercise her appointing power. I have no doubt it was the expectation of both husband and wife, when they made the settlement, that she would exercise that appointing power in his favor, if he should be in a condition to reap the benefit for himself, but that she would not do it if his creditors were to pocket her estate. So much as to my own views of this settlement. Judge LYON and myself arrived at exactly opposite conclusions, he thinking that the husband was not excluded after the death of the wife, and I thinking that he was, each of us founding his opinion upon the terms of the settlement itself. Judge LUMPKIN thought that it was not perfectly clear from the settlement itself, that the husband was intended to be excluded, and that the settlement had better be submitted to a Jury to be construed in the light of the surrounding circumstances, particularly the alleged insolvency of the husband when the settlement was made. His view and mine, though not the same, necessarily led to a reversal of the judgment below, which coincided with the view of Judge LYON. Judge LUMPKIN and myself then had to give direction to the case on the next trial which we had awarded. As he could not go so far as I had gone, I fell back upon his position as the only possible solution of the difficulty, and we united upon that as the instruction for the future government of the case. I will add a few words in explanation of the important light which may be derived from the insolvency of the husband at the time of the marriage, if that fact really existed as alleged in the bill. Its significance does not consist in its being a motive to the settlement, though in point of fact, it very probably was a leading cause of the settlement, but in its being a probable motive to that particular part of the settlement which clothed the wife with an appointing power in case of her death with

out issue. Supposing this provision to have been inserted with a view of exercising it for his benefit, in case he should afterwards get in a situation to profit by his wife's bounty, (a very reasonable and probable supposition,) then the parties must have considered that *without the exercise of that power*, the effect of the settlement was to exclude him after her death. I am obliged to think that the present case is a much stronger one for the exclusion of the husband than another in which this Court excluded him. See *Holmes vs. Lip-
foot*, 8 Ga. Rep., 279.

Judgment reversed.

HARWELL vs. LIVELY et al.

When a Will has been revoked by a subsequent Will, the revocation of the latter does not *per se* revive the former, nor can it be revived except by republication in writing, attested by three witnesses, or by codicil duly executed.

Citation, to show cause why probate of Will should not be set aside—appeal from the Ordinary, in Putnam Superior Court. Tried before Judge HARRIS at March Term, 1860.

This case originated in a citation sued out at the instance of Mrs. Susan Lively, requiring Thomas B. Harwell, executor of L. P. Harwell, deceased, to show cause why his letters testamentary, and the probate of the Will of said Lewis P., granted by the Ordinary of said county, at October Term, 1858, should not be revoked, vacated and set aside, on the ground that said paper was admitted to record and probate was not the last Will and testament of deceased, but that the same had been revoked by a Will subsequently executed in due form of Law, and which latter Will had been lost or destroyed; but which

Harwell vs. Lively et al.

nevertheless, operated as an effectual and complete, and perpetual revocation of said former Will, unless the same had been revised and re-published agreeably to the forms required for making an original Will.

The executor, in answer to the citation or Will, showed for cause—

1st. That said Susan W. was duly cited, (she being then a widow and the heir at Law of said Lewis P. Harwell,) to appear when said executor proved said Will in solemn form before the Court of Ordinary, but failed to appear and make any objection thereto, and that she is barred and precluded by said proceedings.

2. Because said Will was solemnly proven as aforesaid, and letters testamentary granted to defendant, and afterwards, the said Susan W. had, and retained the possession, use and control of the house and lot and furniture, bequeathed to her by said Will for life. That she has recognized respondent as the only and legally qualified executor of said Will; acquiesced in his qualification, and purchased property at the sale made by him as such executor, and received from him the twelve months support allowed her by Law.

And for these reasons respondent submits that said Susan W. is forever barred and precluded from opening or controverting the legality of the judgment admitting said Will to probate.

Further, respondent answered that said Will, which was dated in February, 1858, was not revoked by the latter Will of July, 1858, there being no revocatory clause in said last Will, and the bequests and dispositions of the two Wills not being materially different, and that said last Will not being found, the presumption is, that testator destroyed it, and he thereby intended to revive and re-publish his former Will, and that such was the effect of such revocation and destruction.

The testimony being closed, counsel for the executor requested the Court to charge the Jury, that when a Will traced into the possession of testator and cannot be found after his death, upon diligent search, the presumption of Law is, that the testator destroyed it *animo revocandi*; and they believed that testator destroyed or otherwise cancelled the last Will, with the intention to revive the Will first made and which had been admitted to probate, and not to dis-testate, then they should find for the executor. The

part of which charge the Court gave as requested, but refused to give the second or latter part thereof. To which refusal counsel for respondent excepted.

The Court then proceeded to charge the Jury as follows :

"If the testimony shows that a Will was subsequently made, duly signed and witnessed, the last Will, if conflicting in its disposition, is necessarily a revocation of a previous one. If the testimony should lead you to believe that the last Will has been suppressed by any one, that does not destroy its validity, but it may be set up and established by proper proceedings in the appropriate tribunal. It is not important, however, to this investigation to pronounce upon the validity of that last Will, and its being set up, nor whether it was cancelled by testator or not. The question is, Does it not revoke the prior Will which has been admitted to probate? As a legal question, I say to you that a later Will *per se* revokes an older Will, unless the contrary be expressed in the last one; the last Will presumptively conflicts with the dispositions of a prior one. It is contended that the last Will was destroyed by the testator himself; with the testimony as to that you must deal only. But assuming that deceased did destroy or cancel the last Will, I charge you that a previous Will cannot be set up but by revival, re-publication. This question doubtless involves the intention of the testator, but it involves something more. It involves the question of what amount or quantity of testimony is necessary to evidence such intention. You must inquire if there be three competent witnesses testifying ~~like~~ as to the revival of the prior Will. Our Statute requires three witnesses now to every Will. Can a defunct, dead Will be revived by a ~~few~~ number? I think not. I am disposed to think any other rule will be unsafe but this: to require every revival or re-publication of a revoked Will to be evidenced in writing, and signed by him who re-publishes in the presence of three attesting witnesses; and in the absence of express and controlling adjudications, I charge you that such a rule as I have indicated is essential to give effect to the spirit of our recent Act requiring three witnesses. And such a rule will harmonize with the rule that, as conceded, prevails in reference to the re-publication of ~~its~~ of land in England. Indeed, without adopting such a rule in all cases of revival of re-publication of defunct Wills, the greatest frauds might be practiced on testators. Aban-

Harwell vs. Liveley et al.

done intention, might be resuscitated on light, vague conversations, and a force and power given to them contrary to their last legal authenticated intentions." To which charge of the Court, counsel for respondent did then and there except, and do now except. The Jury found a verdict revoking and setting aside the probate of the prior Will of February, 1858. And the counsel for the respondent tender this their Bill of Exceptions, and say that the Court erred: First, in refusing to instruct the Jury as requested by respondent in his second request hereinafter set forth. Second, in instructing the Jury "that a later Will *per se* revokes a former Will, unless the contrary be expressed in a later Will;" because whilst this is true as a naked legal proposition, it was not applicable to the facts of this case, there being evidence before the Jury that the later Will had been revoked. Third, in instructing the Jury, "that if the testimony showed a subsequently made Will, ~~not~~ signed and witnessed, that last Will, if conflicting in its dispositions, is necessarily a revocation of a previous one," for the reason given in the second specification as above. Fourth, in instructing the Jury that the intention of the testator to revive the Will of February, 1858, must be shown by the testimony of three competent witnesses. Fifth, in instructing the Jury that any revival or republication of a revoked Will must be evidenced in writing and signed by him who re-publishes in the presence of three attesting witnesses.

E. A. & J. A. NESBIT, & W. A. ~~Price~~, for plaintiff in error.

DAVIS & LAMSON, HUDSON & MCKINLEY, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

His Honor Judge HARRIS, was asked by the counsel for the respondent, to charge the Jury as follows, to-wit:

"That when a Will is traced into the possession of the testator, and cannot be found, upon diligent search after his death, the presumption of Law is, that the testator destroyed it *animo revocandi*. And further,

"That if the Jury believed, from all the facts and circumstances of the case in evidence before them, that the testator

destroyed or otherwise cancelled the last Will with a mind and intention to revive the Will admitted to probate, (namely, the Will of February, 1858,) and not to die intestate, they must find for the respondent."

The first of these charges the Court gave as requested, the second was refused. The Judge instructed the Jury, that if the testimony established that a Will had been duly made and published in July, 1858, the provisions of which were in conflict with the previous Will of February of that year, the last Will was necessarily and *per se* a revocation of the former. And that being so, the former Will cannot be set up but by re-publication. "This doubtless," said the Judge, involves the intention of the testator, but it does more; what amount or quantity of testimony is necessary to evidence such intention? You will inquire, Gentlemen of the Jury, if there be three competent witnesses testifying to the revival of the Gorley Will of February. The Statute of Georgia requires three witnesses now to every Will. Can a dead Will be revived by a less number? I think not. This I conceive to be the only safe rule, namely: to require every revival, or re-publication of a defunct Will, in order to be valid, to be reduced to writing and signed by the testator in the presence of three attesting witnesses. And in the absence of express and controlling adjudications, I charge you, that such a rule as I have indicated, is essential to give effect to the spirit of our recent Act, requiring three witnesses; and such a rule will harmonize with that which it is conceded prevails, as it respects the republication of Wills to land in England. Indeed, without adopting such a rule in all cases of revival, or re-publication of revoked Wills, the grossest frauds would be practiced upon testators. Abandoned intentions might be resuscitated, and a force and effect given to vague desultory conversations contrary to their last legally authenticated intentions." To which charge as given, counsel for the respondent excepted.

Two questions are presented in the record: *First*, Does the revocation of the Will of July, 1858, *ipso facto*, revive the Will of February, 1858? And *secondly*, Is it competent to show by parol proof, that such was the intention of Lewis P. Harwell, the testator?

When this case was before this Court six months ago, it was expressed its opinion upon the first point made in the bill of Exceptions.

It has been a long mooted question whether the single fact of the revocation of a subsequent Will revives a prior revoked one. The argument in favor of the revival is this: The first Will would be good but for the last which revokes it, and this last, being itself afterwards revoked, becomes a *nullity*—has no effect whatever, and of course leaves the prior Will unaffected. And it is analogized to the case of a Statute revived by the repeal of another which had repealed the first. Such is the rule of the Common Law in the case of *Statutes*, but the Civil Law is different, and so is the good reason of the thing different. When a principle is *sound* it ought to be carried to all strictly analagous cases, unless stringent authority forbids; but if the principle be *unsound*, analogy ought not to be allowed to carry it to a single case beyond the imperative demands of authority—the cases in which it has been already planted by decisions. Then is it a sound logical principle that a Statute is revived by killing the Statute which had previously killed the first? Is a dead man revived by killing his slayer? Is not the result rather this: Whereas, you had at first but one dead man, now you have two? But this is itself but an analogy, and analogies are often fallacious from want of exact parallelism in the two cases. Take, therefore, the case before us; here are two Wills of different dates and inconsistent provisions, and the last one in point of date, is confessedly revoked, which of these papers, or does either, show the *final* testamentary mind of the testator? I say neither does. The last one does not, as is admitted by every body; for it is expressly revoked. How is it with the first? That contains what *was once* his mind, but we know that he changed that mind *when he made the last one*. How do we know that he ever reverted to it? It is said that he changed again when he revoked the last. This is true, but *to what* did he change? The case is this: He had a scheme and abandoned it for another, and thus abandoned the second. All, so far, is clear and satisfactory, but can you go further and say, that when he abandons the last he returned to the first? If these two schemes comprehended *all the possible dispositions* of his property, then the conclusion would be a logical one, that when he abandoned the one he returned to the other. But when the number of possible schemes in every case is legion, you cannot say that because he has departed from any one, you know his mind has settled

upon any other particular one out of that infinite number. The whole fallacy lies in assuming that the two papers *exhaust* the subject. It seems to me that the abandonment of any one scheme does not, of itself, afford the least *indication* in favor of any other particular one out of an infinite number. Then it cannot be said, as the third charge declares, that the probate of a will cannot be defeated or revoked by proof of a later inconsistent Will, unless the last one, itself, goes to probate. The question on a probate of a Will, is, whether the paper propounded contains the final testamentary scheme of the testator? If it does not, it is not his Will, and any paper which shows that though the paper propounded was once his Will, it had *ceased* to be so, would defeat the proposed probate without re-butting proof, whether such later paper was it itself offered for probate or not.

It must be conceded that there is much Law, especially in the text-books, from the decision by Lord Mansfield in *Glazier vs. Glazier*, 4th Burrows ——— in 1770, down to 1 Victoria ch. 26, § 22, adverse to the doctrine held by this Court in this case last November. Still the rule as laid down by the King's Bench, was often doubted in England, and expressly denied to be Law by many Judges, and to settle this vexed question, the British Parliament, at the period indicated above, passed a Statute declaring that "No Will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived, otherwise than by a re-execution thereof, that is, by a writing fully attested, or by a codicil, in manner herein before required, and showing an intention to revive the same."

It being admitted that Wills to land could not be revived by parol in England since the enactment of the Statute of Frauds, and the Act of January, 1832, having put Wills of personalty or Wills of land and personalty on the same footing as Wills of land by the Statute of Frauds, as to making revocation and re-publication, we think it best to affirm *in toto* the judgment of our learned brother, there being no binding authority to the contrary. And calculated as it is to subserve and enforce the tenor and spirit of our own Legislation, and give to our people the full benefit of the two hundred years experience of the Mother Country, as embodied in the late Act, which we have quoted, is it not the dictate of wisdom to begin in this State where they have ended in England? We think so.



CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT

ATHENS, MAY TERM, 1860.

Present—JOSEPH H. LUMPKIN, }
RICHARD F. LYON, } JUDGES.
CHARLES J. JENKINS, }

JARRETT *vs.* ARNOLD.

It is a violation of the Act of 1850, making it unlawful for the Judge to express or intimate to the Jury what was or has not been proved, to charge them that they should find for the plaintiff the amount which he claims, if they believe the witnesses who testified in the case.

Complaint, in Taliaferro Superior Court. Tried on the Appeal, before Judge THOMAS, at February Term, 1860.

This was an action by Arnold against the plaintiff in error, as administratrix of Johnson Jarrett, deceased, to recover for services rendered testator, as nurse, in his last illness. The declaration was in the common form of complaint, and had annexed the account for said services, amounting to \$500. The *quantum meruit* count was afterwards added by way of amendment.

The testimony being closed, the presiding Judge charged the Jury, stating the grounds upon which the plaintiff relied to support his action, and upon which the defendant resisted it, and commenting upon the points presented by the record

Jarrett vs. Arnold.

and evidence. The Jury found for the plaintiff five hundred dollars; whereupon, defendant filed her bill of exceptions, assigning as error said charge.

1st. In excluding from the consideration of the Jury important testimony as to the character in which plaintiff rendered the alleged services, whether as a hireling or as a friend and relation, without intending or expecting to charge therefor.

2d. In excluding from their consideration the proper amount of compensation for said services, if he were entitled to compensation at all.

3d. In excluding from the consideration of the Jury the question as to whether the remarks proven to have been made by testator were to be considered as words imparting a gift or bequest, or a contract and legal liability.

4th. In expressing an opinion upon the value to be put upon the evidence in the case.

WM. M. REESE, for plaintiff in error.

SAM. BARNETT, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

After referring to the testimony, Judge THOMAS, in conclusion, said to the Jury: "Therefore, I charge you that if you believe the evidence of Cull and also of Smith and Chafin, you ought to find a verdict for the plaintiff for the sum of five hundred dollars, with interest from the time the services were fully completed and ended."

It is complained by counsel for the defendant below, that the foregoing, as well as other portions of His Honor's charge, are violatory of the Act of 1850, which makes it unlawful for the Judge to express or intimate to the Jury what he has or has not been proved in any case. (*Cobb*, 462.) It would seem that the learned Judge had expressed a pre-decided opinion, that the special contract set up by the plaintiff had been fully proved by the witnesses who were sworn upon the trial, and that it only remained for the Jury to settle in their own minds whether or not Cull, and Smith, and Chafin were to be believed.

I would merely add, that no one, so far as the record

closes, doubted the varacity of the witnesses; and the only question made was, Had they made out, by proof, the special contract, namely: that the plaintiff was to get five hundred dollars for nursing the deceased during his nine days of illness?

WRIGHT vs. THE STATE OF GEORGIA.

1. *On an indictment for malicious mischief in shooting a mule, it is a good defense to show that the shooting was done with the motive of protecting the crop of the accused, and not from either ill-will to the owner or cruelty to the animal; and it is the line of this defense to show that the mule was in the corn-field of the accused at the time of the shooting; and the evidence showing him to have been there is corroborated by proof that he had an habitual proclivity towards such mischief, and was hard to be restrained from it.*

Indictment for Malicious Mischief, in Warren Superior Court. Tried before Judge THOMAS, at April Term, 1860.

The plaintiff in error was indicted for malicious mischief, in the shooting and killing a mule belonging to John T. Baker.

DR. BAKER, the owner of the mule, testified: That defendant told him that he shot the mule some time last summer; said he shot him for getting into his corn-field, and while he was in the field. The mule was worth one hundred dollars; the mule was shot in his hind parts; was brought home, and died; the only corn-field defendant had adjoined witness' farm, and was separated from it by a fence; one-half the fence witness was to keep up, and Wright the other half; in the spring defendant came and complained that the mule had been in his field; witness promised to keep him up if he could; the mule was a stud mule.

Here the State closed.

Wright vs. The State of Georgia.

Evidence for Defendant.

JOEL W. GUNN testified: That he heard a conversation between Dr. Baker, the prosecutor and owner of the mule, and Wright last summer or fall; in that conversation, Wright told Baker that he shot the mule in his corn-field, and asked the Doctor if he did not tell him to shoot him if he got in his field any more? Dr. Baker said he did; he did not tell him he could shoot him if he dared, or if he did shoot him he would run the law on him, or any thing of that kind, that witness heard; don't think he did; believed he heard all that was said.

Defendant then proposed to prove by several witnesses the character of the mule; that he was an unmanageable, plundering animal, not subject to ordinary control, and given to breaking open stables, and tearing down and jumping fences, &c. The Court repelled this evidence, and counsel for defendant excepted. Here defendant closed.

DR. BAKER, recalled by the State, testified: That the conversation which Gunn speaks of, is the same witness referred to upon his first examination; it may have occurred as Mr. Gunn says; he don't recollect *then* telling Wright that he told him to shoot the mule if he dared; was vexed, and supposes Mr. Wright was, at the time; never gave him permission to shoot the mule; when he complained, he said if the mule got into his field again, or if witness did not keep him away, he would shoot him, and I told him to shoot him if he dared, and I would prosecute him. This was all that occurred.

Upon this testimony the case was submitted to the Jury, who returned a verdict of guilty; whereupon, defendant moved for a new trial, upon the following grounds:

1st. Because the Court erred in rejecting the testimony of the witnesses proposed to be introduced as to the habits and character of the mule.

2d. Because the verdict was contrary to Law and the evidence, and the charge of the Court, and is strongly and decidedly against the weight of evidence.

3d. Because of the newly discovered testimony of James R. Gunn, to the effect that Dr. Baker, the prosecutor and owner of the mule, after he was shot, told said witness that Wright had shot his mule, and that he told him to do it if he troubled him any more, and was glad that he had done it.

ATHENS, MAY TERM, 1860.

Wright vs. The State of Georgia.

The Court refused the motion for a new trial, and granted excepted, assigning said refusal as error.

WASDEN & NELMS, for plaintiff it error.

JOHN C. BURCH, Sol. General, and AKERMAN, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

We think the proposed evidence of the mule's thievish and unmanageable character was improperly rejected. It was material, by way of support, to the other evidence which showed that Wright's motive in shooting the mule, was a desire to protect his crop, and not either ill-will to the owner or cruelty to the mule. The whole evidence against Wright was his own admission that he had shot the mule. This admission was coupled with a statement that he had shot him to keep him out of his corn-field, and that the mule *was in his field* when he shot him. Now, the truth of this statement, that the mule was in his field, was most material to his defense, and the fact that the mule had a proclivity for being in such places, and was hard to be kept out of them, supported the probability of the statement. If the mule really was in his field as he asserted, the fact very powerfully supported his further assertion that his motive in shooting was the protection of his crop. The question to be tried was, not whether he was *justified* in shooting the mule, but whether his motive in shooting was *malicious*? The question of justification would be the issue in an action for damages against him, but on this indictment the issue was, malice or no malice. If he shot from the motive of protecting his crop, and not from either ill-will to the owner or cruelty to the animal, his motive was not *malicious*, whether it was justifiable or not, and his act was not malicious mischief. I will add, that with this view of the Law, I think the verdict of guilty is unsupported by the evidence. The Court did not consider this view of the case, and I speak only for myself in expressing the opinion that the evidence is not sufficient to support a conviction. The facts all seem to me to point to the motive of protecting the crop, and not at all, or very slightly if at all, to any ill-will to the owner or cruelty to the mule.

Judgment reversed.

*Shirley vs. Price et al.*SHIRLEY vs. PRICE *et al.*

1. An appeal thus entered upon the Minutes of the Justice's Court is sufficient: "I stand security on the appeal of the above stated case," the case being stated and the name of the party signed thereto.
2. It is proper, if not positively required by the true construction of the Act of 1811, that parties in the Justice's Court should testify orally when proving their accounts by their own oaths, and be subject to cross-examination by their adversary.

Certiorari, in Habersham Superior Court. Decision by Judge HUTCHINS, at October Term, 1859.

This was a certiorari sued out by W. C. and A. Price, to correct certain errors alleged to have been committed in a Justice Court, in a cause therein pending by petitioners for certiorari, against John Shirley. Plaintiff's action was brought on a note, and Shirley pleaded a set-off.

Upon the first trial before the Justice, there was a judgment for the plaintiff; whereupon, defendant appealed.

The first error alleged to have been committed by the Justice Court, was the refusal, upon motion, to dismiss the appeal, upon the ground that appellant had not given the bond and security required by Law. There was simply an entry on the Minutes that the defendant had paid the cost, and the following: "I stand security on the appeal of the above stated case." (Signed) "BEVERLY SHIRLEY."

The second error complained of was, that after defendant had proven his set-off by his own oath or affidavit, plaintiffs were not allowed to cross-examine him. The Justices, in their answer to the certiorari, on this part of the case, say: "that about the time the argument closed, plaintiffs' attorney objected to defendant's affidavit, on the ground that he had not been turned over to him for cross-examination," and they overruled the objection on the ground that it came too late.

Upon hearing said certiorari, the presiding Judge of the Superior Court (Hutchins) sustained the same, and set aside the verdict in the Justice Court, on both the grounds taken in the petition for certiorari; to-wit: that no bond was taken and security given by the appellant, as required by Law in cases of appeal, and that plaintiffs were not allowed to cross-examine defendant.

Shirley vs. Price et al.

To which decision counsel for Shirley excepted.

C. H. SUTTON, for plaintiff in error.

WILLIAM T. CRANE, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It is unnecessary to repeat what has been frequently decided by this Court, that it is only necessary for the security, and not the party, to sign the appeal. Neither is there a bond required by the Statute.

Here Beverly Shirley enters into a recognisance upon the Minutes of the Court, as follows: "I stand security on the appeal of the above stated case," his name being signed thereto, which is to this effect: I stand security for the eventual costs and condemnation money in the above case. Had the suit terminated against the defendant instead of his favor, can any one doubt but that Shirley would have been held liable? For myself, I am clear that the Justices of the Peace were right in refusing to dismiss the appeal. If it had been adjudged to have been defectively entered, there can be no doubt but that it was amendable.

As to the other point in the case, our opinion is, that the better practice would be, under the Act of 1811, to require the party in the Justices' Court to make the preliminary oath in writing, that he or she has no other evidence whereby to establish their account, except by their own oath; and then to testify orally like any other witness, and be subject to cross-examination at the instance of their adversary. It will better subserve the ends of justice. Indeed, we are satisfied that it is the true construction of the Statute.

The Act passed in 1827, in favor of non-resident plaintiffs, favors this interpretation: It recites, that the practice pursued in Justices' Courts of requiring open accounts to be proven in open Court, in order to make them evidence, is, in case of non-resident plaintiffs, highly inconvenient; and hence, it provides that where the debtor has removed to another county, that the account may be proven by a written affidavit authorized to administer on oath; and when so proven, shall be received in evidence upon the trial of the suit, as though the same had been proven in open Court. (Cobb, 649.)

Grimes vs. Reese & Linton.

But the difficulty here is, not so much that the objection of the plaintiff to the mode in which the defendants' set-off was proved, come too late—being at the close of the argument—but as it is stated in the return of the Magistrates, there is nothing practical in it. In other words, it has no point. "About the time the argument closed," says the Justices, "plaintiff's attorney objected to the defendants' affidavit, on the ground that he had not been turned over to him for cross-examination." He made no objection to the affidavit when read. He did not apply to cross-examine the party either at the proper time, or even when this eleventh hour complaint was made. What error was there committed by the Court to which any exception was taken? Had application been made, even at that late stage of the case, to cross-interrogate the defendant, there is nothing from which we may infer that the permission would not have been allowed.

We think, therefore, that the Court below erred in sustaining the certiorari, and that the judgment in the Justices' Court should stand.

GRIMES vs. REESE & LINTON.

1. Unliquidated damages cannot be pleaded as a set-off.
2. Where the plaintiff sues in the common Courts, it is competent for the defendant to plead and prove that there was a special contract, and that by the breach thereof the plaintiff has demanded the defendant in an amount more than the plaintiff claims.
3. Where the same contract lays mutual duties and obligations on the two parties, and one seeks a remedy for a breach of duty by the second, the other may meet the demand by a claim for a breach of duty against the first.

Complaint, in Hancock Superior Court. Tried before Judge THOMAS, at October Term, 1859.

This was an action brought by Reese & Linton, Ware-

Grimes vs. Reese & Linton.

house and Commission Merchants, of the city of Augusta, against Frances A. Grimes, administratrix of the estate of Thomas C. Grimes, deceased, to recover the balance due on an account, principally for money paid and advanced to defendant upon orders drawn by her on plaintiffs. The balance claimed was \$1,476 50.

The entire account amounts to	\$8,037 41
1857. June 26.—Cr. by proceeds of 58 bales cotton,	\$2,915 81
1857. Dec. 30.—Cr. by proceeds of 112 bales cotton,	\$8,645 10
	<hr/> \$8,560 90

Balance due Reese & Linton, \$1,476 50

The account was made by defendant after the death of her intestate.

The defendant pleaded—

1st. That she was not indebted to plaintiffs as administratrix of Thomas C. Grimes, deceased, nor did she have any legal power or authority to make such contract as *administratrix*, or to bind thereby the estate of her intestate.

2d. That defendant made a consignment of 112 bales of cotton to plaintiffs, who agreed to hold the same for defendant during the cotton season, or not to sell the same under 13 cents per pound, and that they would make to her advancements thereon upon the usual commissions of $2\frac{1}{2}$ per cent.; and that plaintiffs, in violation of this agreement, and without the order or authority of the defendant, sold said cotton on the 30th December, at and for 9 cents per pound, thereby causing a loss to defendant of \$1,872 60, being the difference between the sale of said cotton at 13 cents and 9 cents, and defendant avers that said cotton could have been sold for 13 cents per pound before the end of the cotton season, to-wit: in the month of April after the sale; and defendant plead this sum, \$1,872 60, as an off-set to plaintiff's demand.

At the trial, counsel for defendants demurred to plaintiff's declaration, upon the ground that it contained no cause of action against the defendant in her representative character as administratrix of Thomas C. Grimes, but that the demand, if any existed, was against her individually.

Grimes vs. Reese & Limon.

The presiding Judge overruled the demurrer, and defendant excepted.

Counsel for plaintiff demurred to the second plea of defendants' above stated, and moved that it be stricken, upon the ground that the demand therein pleaded was for unliquidated damages, and insufficient, in Law, as a plea of set-off.

The Court sustained the demurrer and ordered the plea to be struck; to which decision defendant excepted.

WASDEN & NELMS, and FULLER, for plaintiff in error.

MILES W. LEWIS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This is the usual action brought by factors for over-advances made to a customer.

The defendant, by her plea, sets up a special contract, by which, in consideration that she would store her cotton with the plaintiffs, they agreed to withhold the cotton from the market for the year, or one entire cotton season, unless ordered to sell within that time. The plea further charges, that in pursuance of said agreement, she stored a large quantity of cotton, to-wit: one hundred and twelve bales with the plaintiffs in the fall and winter of 1857, which they sold in the month of December of that year; whereas, by keeping back the cotton till April following, upwards of eighteen hundred dollars more could have been realized upon it, which she pleads as a set-off to the plaintiffs' demand, and claims a judgment for a balance.

The Court decided that the defendant's claim for unliquidated damages, resulting from the breach of the special contract, cannot be pleaded to the suit. And viewed as a plea of set-off, the Court was right. Had this plea of a special contract, however, been stated with sufficient certainty, would it not have defeated the plaintiffs' action? What right had they to sue upon a common count, provided there was a special contract, the non-observance of which had caused a greater loss to her than the benefits conferred by the plaintiffs?

Why would not the doctrine of recoupment apply in such a case? Where the same contract lays mutual duties on

obligations on the two parties, and one seeks remedy for the breach of duty by the second, the second meets the demand by a claim for a breach of duty against the first. (2 *Parson's on Contracts*, 247.)

In a note to the text, the author, Mr. Parsons, says: "The doctrine of recoupment is not a new one in the, Common Law. It was formerly used to signify, and does now in many Courts and decisions, a right of deduction from the amount of the plaintiff's claim, either from part payment or defective performance of contract on the part of the plaintiff, or from any analogous fact."

Thus it will be perceived that the distinction between allowing a certain defense by way of set-off, and recoupment, is clear and well defined.

But the difficulty in this case results from the uncertainty in the defendant's plea, or rather pleas, for there are four filed. Neither of the pleas taken separately nor all together constitute a good defense to the action. It is no where stated when the contract relied on by Mrs. Grimes was made; and in the defense set up, such an allegation was essential. Why select April, 1858, as the time when the cotton, if kept, could have been sold at the largest profit? Was that within the twelve months from the date of the contract, or was it at its termination? If the contract was made as far back as April, 1857—a fact hardly to be supposed—upwards of eleven hundred dollars of the plaintiffs' demand had accrued before that time. And, to say nothing of the want of consideration in this contract, so far as these previous advances and payments were concerned, it is no where directly and distinctly averred that the subsequent agreement included this past or executed consideration. To show the importance of ascertaining clearly from the answer when this contract was made, it may be pertinently asked, does it affirmatively appear that it was to have been executed within twelve months from its date? And if not, is it valid under the Statute of Frauds? The plea lacks certainty. It is inferential only, to say the most for it. Indeed, the matters are so mixed up, that it does not very satisfactorily appear whether the sale of the cotton on the 30th of December, 1857, was to be treated as a breach of a special contract, or a violation of orders respecting the produce. And these, in their legal effects and consequences, would constitute very different defenses.

 Brawner vs. Bell.

Upon the whole, as the affirmance of the judgment will only force the defendant to resort to an independent suit against the plaintiffs to establish her opposing claim, we are not inclined to strain too far the rules of pleading to prevent the necessity of this course. When we consider that the Constitution entitles a defendant to be sued in his own county, the doctrine of set-off or recoupment even operates prejudicially to him, and the Courts should not stretch it beyond its legitimate bounds. The plaintiffs sued Mrs. Grimes in Hancock: let her institute her action against them in Richmond.

BRAWNER vs. BELL.

1. A married woman has the right to dismiss her bill in Chancery in relation to her separate estate, against the wish of her next friend.

In Equity, in Elbert Superior Court. Decision by the Honorable THOMAS W. THOMAS, presiding Judge, at March Term, 1860.

Mrs. Elizabeth E. Brawner, by her next friend, Thomas Bell, filed her bill in Equity against her husband, Benajah H. Brawner, praying that he might be removed from his trusteeship of certain property belonging to her as *cestui que trust*, and that a receiver be appointed to take possession and control of the property (negroes) during the litigation and until another trustee was appointed. The bill charged that complainant and her husband had resided in the State of Alabama, but that owing to his violence, cruelty and drunkenness, she had been compelled to leave him and return to her friends in Elbert county, Georgia, and that she brought said negroes back with her; that since her return to Elbert, said Benajah, her husband, has pursued her and lurks around the neighborhood, seeking to seize and carry off to Alabama

aid negroes. The bill prayed the appointment of a receiver, and that defendant be enjoined from interfering with said negroes. This bill was filed 7th October, 1859, and William T. Vanduser was complainant's solicitor. The Judge to whom the bill was presented, on the 8th October, 1859, granted the order appointing William G. Bullard receiver, and ordered the negroes to be seized by the Sheriff and delivered to said receiver, which was done. The defendant, Benajah H. Brawner, was never served with the copy of the bill, subpenæ, or other process in the cause.

On the 5th November, 1859, the said Elizabeth E. Brawner filed in the Clerk's office a writing dismissing said bill, and directing the Clerk to enter it as dismissed. She, about the same time, presented a petition to the Judge at Chambers, praying that said bill should be dismissed, and that her husband should continue and remain as trustee. She stated in her petition that she and her husband had become reconciled to each other; that he had returned to Alabama and purchased a farm there, and that she desired to go and live with him, and that they should have the use and services of the negroes, which were essential to her comfort. She prayed that the order appointing the receiver might be rescinded; that the negroes be restored to her husband, and that the bill be dismissed. She further offered to pay all cost, and reasonable counsel fees, &c.

The motion to dismiss was resisted by the next friend, Bell, and the presiding Judge, after argument, overruled the motion, and refused to dismiss the bill or grant any of the orders prayed for.

To which decision counsel for Mrs. Brawner excepted, and assigned the same as error.

HESTER & AKERMAN, for plaintiff in error.

By the Court.—STEPHENS, J., delivering the opinion.

We do not think that the next friend had any right to prevent the complainant from dismissing her own bill. It was her bill, not his, he being interposed only to have a party responsible for cost. She offered to pay the cost, and so relieved the next friend of all interest which he had in the matter. *Her will* was necessary to the commencement of the

Vanduzer vs. Christian.

suit, and why not equally necessary to its maintenance? Courts may take care of the interest of idiots, lunatics and minors, against their wills, but not married women. These, as to their separate estates, are in effect *femes sole*, with capacity and will which Equity will not disregard. A complainant may dismiss his bill when he chooses, provided the dismissal does not injure the other parties. This lady was the real party complainant, and the other party was consenting to the motion. There was no suggestion of injury to any body but herself, and of that, she had capacity to judge for herself.

Judgment reversed.

VANDUZER vs. CHRISTIAN.

1. When the defendant in execution remains in the possession of the land, under some parol agreement with the purchaser as to its redemption, makes valuable improvements thereon, and the purchaser acknowledges himself satisfied as to the manner in which the re-payment has been arranged, the tenant acquires a complete Equity to the premises, and one upon which he may rely to protect his possession against an action brought by the purchasers.

Complaint for Land, in Elbert Superior Court. Tried before Judge THOMAS, at March Term, 1860.

This was an action brought by William T. Vanduzer, administrator of Ira Christian, deceased, against Jesse G. Christian, for the recovery of a certain tract or parcel of land situated in the county of Elbert, on the waters of Deep Creek, containing one hundred and six acres, more or less.

Upon the trial, plaintiff offered in evidence the following testimony :

1st. An execution in favor of Snowden & Shear, against Jesse G. Christian, the defendant, James Hendrick and Nelson Burden, with a levy entered thereon, upon the land in controversy, dated 26th January, 1844, and sale thereof to Ira Christian, plaintiff's intestate, made 5th March, 1844.

2d. A deed from the Sheriff of Elbert county conveying said land to Ira Christian, dated 5th March, 1844, in which the consideration expressed was six dollars and fifty cents.

3d. ROBERT P. DICKENSON, a witness, sworn, testified: That the levy and deed covered the land in dispute, and that defendant was in possession at the commencement of this action, and that he had built some houses on the premises.

4th. ADKINS OGLESBY testified: That some five or six years before Ira Christian died, he heard a conversation between him and defendant relative to the land; defendant had heard that Ira Christian was about to sell the land, and went to him and claimed that he, Ira, should give him the preference over any other purchaser; defendant had lived on the land a long time; was living there prior to, and at the time of the sale by the Sheriff in 1844; Ira Christian died 27th December, 1856; after the purchase by Ira Christian, defendant built some houses on the land, and made some clearings and fences; had built the house he lived in.

Evidence for Defendant.

WILLIAM CHRISTIAN testified: That defendant had lived on the land some sixteen or seventeen years; shortly after the purchase by Ira Christian, at Sheriff's sale, witness had a conversation with him about it; witness asked him about the land, and told him he had heard that he intended to keep the land he had purchased at Sheriff's sale, belonging to witness' son, Jesse G. Christian; Ira replied, that he did not intend to keep it, but that he bought it for Jesse; that he gave little or nothing for it; thinks he said he gave but six dollars and a-half for it, and that he did not buy it for himself.

JOSEPHUS MAXWELL testified: That in the year 1858, defendant came to Ira Christian's house, in Elberton, to see about getting this land from him; they went off by themselves and had a conversation; they came back, and Ira

Vanduzer vs. Christian.

Christian asked witness if he would settle fifty dollars for defendant in their settlement? witness replied, "Yes;" then Ira turned to Jesse and told him to go home and he would fix up the papers at some other time; Jesse had cleared some land and put up some buildings on it, but of no great value; witness had never settled the fifty dollars with Ira Christian. (The presiding Judge adds, that his recollection of Maxwell's testimony was, that Ira Christian said: "Joe, will you settle fifty dollars for Jesse in our settlement? If you will, I will make him a deed." Maxwell answered, "Yes." Then Ira turned to Jesse and told him to go home and make himself easy about it; he would make the deed and send it to him or leave it with witness for him; witness stated that he had never settled the fifty dollars with Ira Christian; that he had never had a settlement with him or his estate, but that he was willing at any time to settle the fifty dollars, and that Ira Christian's estate would be owing witness a considerable amount for building his house.)

The testimony being closed, counsel for plaintiff requested the Court to charge the Jury—

That the purchase of the land by Ira Christian at Sheriff's sale, the defendant in execution being in possession at the time, vested the title in the purchaser.

1st. That if the defendant occupied the land since the sale, holding under Ira Christian, the title of the latter was not divested by such occupancy.

2d. That any parol agreement between Ira Christian and defendant, of which evidence had been introduced, for the purchase of the land by the latter, was involved under the Statute of Frauds.

8d. That the Jury could not consider that Ira Christian was paid for the land by the agreement between him and Maxwell, as to the payment of the fifty dollars by the latter, because such agreement was not binding on the parties under the Statute of Frauds.

All of which charges the Court refused to give, except the first; but on the contrary, charged, that though Ira Christian might have received a good title to the land under the Sheriff's sale, yet, if the defendant remained in possession under a verbal contract of purchase, and the purchase money had been paid before the commencement of this suit, the title of plaintiff thereby divested, and he could not recover

Vanduser vs. Christian.

and further, if the Jury believed from the testimony of Maxwell that only fifty dollars of the purchase money remained unpaid at the time of the conversation testified to by him, and that Maxwell promised to settle with Ira Christian fifty dollars for defendant, and therefore Ira promised to execute a deed to defendant, such a promise by Maxwell was good in Law as a payment of the fifty dollars, and the Jury should find for the defendant, notwithstanding both promises were in parol; that if the defendant remained in possession under a verbal contract of purchase, and the purchase money had been paid and permanent improvements made by defendant, that would give him such a title as would enable him in Equity to compel a specific performance of the agreement, and enable him at Law to defend his possession in an action of ejectment against him by Ira Christian or his administrator; that Maxwell's promise to settle the fifty dollars was not a promise to pay the debt of another, and was not void under the Statute of Frauds; that if Ira Christian agreed to accept said promise for payment, it was a good payment, or such as would entitle defendant to a deed, or enable him to defend this action.

To all of which charges and refusals to charge, counsel for plaintiff excepted.

The Jury found for the defendant; whereupon, counsel for plaintiff tender their bill of exceptions, assigning as error the charge and refusal to charge aforesaid.

HESTER & AKERMAN, for plaintiff in error.

NELMS, *contra*.

By the Court—LUMPKIN, J., delivering the opinion.

We are clear, that the law of this case, upon the testimony, is with the defendant, here and in the Court below. The land in dispute was sold in 1844. Ira Christian was the purchaser, at Sheriff's sale, at the nominal sum of \$6 50. He stated to one of the witnesses that he had not bought the land for himself, but for Jesse G. Christian. He never disturbed his possession while he lived. Jesse G. Christian had the house built on the land in which he lives, cleared land and made other improvements. Wm. Maxwell testifies that

Stone et al. vs. Green et al.

he was present in 1858 at an interview between Ira and Jesse G. Christian. They conversed apart about the land. When they returned, Ira said to witness, "Joe, will you pay fifty dollars for Jesse in our settlement?" Witness agreed to do so. Ira then turned to Jesse and told him to go home, and he would fix up the papers at some other time. It further appears that the estate of Ira Christian will be owing Maxwell, the witness, a balance after deducting the fifty dollars for work done by Maxwell for Ira Christian, and that no settlement has ever been made between them.

Jesse G. Christian has a complete Equity, notwithstanding Ira died without executing a deed, as he promised, and no doubt intended to do—an Equity fully adequate to the protection of his possession of the premises. If it be suggested that the purchase money has not been actually paid, the ready reply, that in contemplation of Law, it is paid, inasmuch as Ira Christian held it under the arrangement with Mr. Maxwell in his own hands.

We cheerfully affirm the judgment in this case.

STONE *et. al.* vs. GREEN *et. al.*

1. Notice to the husband of an application to prove a Will in solemn form, when the wife is next of kin to deceased, is not notice to her, so as to conclude her in a subsequent application to caveat the Will.

Appeal from Ordinary on proceedings to probate Will in solemn form, in Hancock Superior Court. Tried before Judge THOMAS, at April Term, 1860.

This case originated in an application by Susan Green and her husband, William Green, to have the paper, which had been admitted to probate and record in solemn form of Law as the last Will and testament of Seaton Francis Trawick, de

Stone et al. vs. Green et al.

ceased, again propounded and proved in solemn form. Applicants state in their petition to the Ordinary, that said Susan was the only child of her deceased father, who was a brother of testator, and that she is thus entitled to a share of said estate as heir at Law or next of kin. They further state, that at the October Term, 1859, of the Court of Ordinary of Hancock county, a paper purporting to be the last Will and testament of said Seaton Francis Trawick, deceased, was propounded for probate by John Stone and Andrew J. Ray, legatees in said Will, and said paper was admitted to probate, and letters of administration, with the Will annexed, were granted to said propounders, who took charge of the entire estate of deceased, and still holds the same. Petitioners submit and claim that they are not barred or estopped by said probate and proceedings in said Court of Ordinary, because—

1st. They were not cited to appear and witness said proceedings—were not parties thereto, nor present thereat.

2d. That said Will is illegal and void in this ; that it provides for the manumission, indirectly and by way of a secret trust, of some or all of the slaves of deceased.

3d. That said alleged Will was procured by undue influence of the said Stone and Ray, fraudulently exercised over deceased.

4th. That at the time of the death of said testator, and at the time of the probate of said Will, in October, 1859, petitioners resided in the State of Louisiana, and were not cited by said Court of Ordinary to attend or witness said probate, and had no reasonable notice thereof, or such notice as would have enabled them to be present with witnesses to contest said probate.

They, therefore, pray that said propounders, Stone and Ray, be cited to appear and show cause " Why they should not be ordered to make proof again of said pretended Will, at May Term of said Court, in solemn form, so that your petitioners may be parties thereto, and have an opportunity to cross-examine the witnesses, and show that said paper is void," &c.

Upon this petition, the Ordinary issued a citation to the propounders, to show cause at the next regular April Term of said Court, why said Will, once before proved, should not be proved again in solemn form. In obedience to this citation, the propounders appeared, and in answer to the same, pleaded in bar the former probate in solemn form, and that mo-

Stone et al. vs. Green et al.

vants were fully estopped and concluded thereby, they having been legally notified of said proceedings as shown by the record.

After argument, the Ordinary dismissed the rule, on the ground that it appeared from the Will, that said Will had been legally proven in solemn form, and after due and legal notice to the parties in interest who are estopped and concluded by said judgment.

From the decision of the Ordinary, movants appealed, and the cause coming on for trial on said appeal in the Superior Court, propounders offered in evidence in support of their answer or plea, the record of the Court of Ordinary and the judgment of said Court in the matter of the former probate of said Will, which judgment is as follows:

"A paper purporting to be the last Will and testament and codicil of Seaton F. Trawick, late of said county, deceased, having been propounded in open Court by John Stone and Andrew J. Ray, two of the legatees named in said written instrument, who show the service of due and legal notice to the next of kin of said deceased, to-wit: Singleton L. Trawick and W. J. Green, husband of Susan F. Green, formerly Susan F. Trawick, and the due and legal execution of said written instrument by said deceased, as his last Will and testament, and the sanity of said testator at the time of the execution thereof being fully established by the testimony of all the subscribing witnesses, and the propounders who were sworn by the caveators. It is considered and adjudged by the Court, that the said written instrument are clearly proven to be the true last Will and testament of the said Seaton F. Trawick, deceased, and that as such, the same are ordered to be recorded, and that the caveat filed in said matter be, and is hereby overruled."

Counsel for petitioners moved to amend their rule nisi, by striking out the word "again," the rule calling on propounders "to prove the Will again in solemn form." The Court allowed the amendment, and counsel for propounders moved for a continuance, on the ground that a material amendment had been made, &c. The Court refused the motion to continue, holding the amendment immaterial, and ordered the cause to proceed.

Propounders then offered in evidence the record of the proceedings and judgment aforesaid, which the Court admitted to be read for what it was worth, but holding that it contain

Stone et al. vs. Green et al.

ed no evidence that the movants had been notified of the proceedings and probate therein contained and set forth. The record being offered and read, counsel for propounders requested the Court to charge the Jury, that the plaintiffs or movants were concluded thereby. This charge the Court refused to give, but stating and holding and charging, that the verdict in this case, in his opinion, should be as follows, to-wit:

"We, the Jury, find that there has been no probate in solemn form as against plaintiffs; that plaintiffs are not estopped by the probate of October, 1859, and that the said John Stone and Andrew J. Ray, as administrators with the Will annexed, shall proceed to prove the Will of Seaton F. Trawick in solemn form, with cost of suit in favor of plaintiffs."

To all of which charge, rulings and instructions, counsel for respondents excepted.

The Jury found the verdict above prescribed by the Court.

Whereupon counsel for respondents tender their Bill of Exceptions, assigning as error the rulings, charges and refusals to charge as aforesaid.

J. W. HUTCHISON, CAIN & LEWIS, A. H. STEPHENS & A. H. KENAN, for plaintiffs in error.

WM. MCKINLY & T. R. R. COBB, *contra*.

By the Court.—LYON, J., delivering the opinion.

Were the caveators, Susan Green and her husband, William Green, concluded or barred by the judgment of the Court of Ordinary probating this Will at October, 1859? We think they were not. That record recites, that two of the legatees to-wit: John Stone and Andrew J. Ray, show the service of due and legal notice to the next of kin of said deceased, Singleton F. Trawick and W. J. Green, husband of Susan F. Green, formerly Susan F. Trawick. This recital, and it is all touching notice, shows that Susan F. Green, in whose right her husband, W. J. Green, was entitled to be heard, if at all, had no notice of that proceeding. Service on, or notice to her husband, was not sufficient as to her. She must have had notice to be bound by the judgment; therefore, there was no error in the verdict of the Jury under the charge

Doebler vs. Waters.

of the Court in requiring the administrators, with Will annexed, to proceed to prove said Will in solemn form. And as that is the only point in the record necessary to notice, the judgment of the Court below must be affirmed.

Judgment affirmed.

DOEBLER *vs.* WATERS.

1. The Bill of Exceptions must affirmatively disclose the error assigned.
2. A promise to pay money is without consideration, and will not be enforced when the reason for giving it is not to cover damages resulting from the failure to perform a contract, but to prevent the failure by a penalty.

Assumpsit, in Gwinnett Superior Court. Tried before Judge HUTCHINS, at September Term, 1859.

This was an action of Assumpsit brought by Valentine S. Doebler against Thomas J. Waters, as drawer upon the following draft or bill, viz :

\$500. PHILADELPHIA, Oct. 22d, 1856.

On the first day of December, 1856, pay to the order of Valentine S. Doebler, five hundred dollars, and charge to account of

THOMAS J. WATERS.

To Mr. Jesse L. Leach, Williamsport, Lee Co., Penn.

Defendant pleaded the general issue.

Upon the trial, plaintiff offered in evidence the above bill, the foundation of the action. He then offered in evidence an agreement between plaintiff and defendant, in relation to the purchase of certain personal property executed in the State of Pennsylvania. Plaintiff proposed to prove defendant's signature thereto by proof of his hand-writing. To which, counsel for defendant objected, upon the ground that the ex-

Dabler vs. Waters.

cation of the agreement was not sufficiently proven by proof of the hand-writing of defendant. The Court sustained the objection, and counsel for plaintiff excepted.

Plaintiff then read in evidence the depositions of Jesse L. Leach, (the drawer of said bill,) who testified that at the time said bill was drawn, he had no funds of the drawer in his hands, nor had he had any since; neither was he indebted to defendant at the time, or at any time since. The consideration of the bill sued on was as follows: In the Fall of 1856, plaintiff and defendant entered into a contract in the City of Philadelphia, by which plaintiff was to deliver to defendant certain furniture, the value of which was about four thousand dollars; defendant was to pay a part in cash and the balance on the 10th of January, 1857, to be secured by bond and mortgage on real estate in Williamsport, Lycoming county, Pennsylvania, for which he was negotiating. This real estate was a hotel and the appurtenances. The furniture aforesaid was in this hotel. Plaintiff was ready to fulfil his part of the contract. Waters then gave this draft to bind the bargain, to be forfeited in the event that he did not fulfil his part of the contract; in case he did fulfil the contract on his part, the draft was to be applied towards liquidating the first payment. He had no funds of Waters' in hand at the time; but he promised to put funds in the hands of witness sufficient to meet the draft. He failed to comply with his part of the contract. The day after the making of said contract and drawing said bill, Waters returned to Georgia, and never remitted any money to meet the draft. Witness says, he induced defendant to draw the draft as an earnest of the bargain; was present when it was drawn and assented to it; did persuade defendant to make the trade, because he had stated that he wished to invest some money in the free States for the benefit of his wife and children, and witness considered that this would be a good investment for him. In the event that the bargain was completed, witness was to take charge of it for defendant, and this was the only interest witness had in the matter. Don't think defendant was intoxicated when he drew the draft.

Here plaintiff closed. Defendant introduced no testimony.

The Jury, under the charge of the Court, found for the defendant. Whereupon plaintiff moved for a new trial upon the following grounds:

Doubler vs. Waters.

1st. Because the verdict was contrary to Law and evidence and the charge of the Court.

2d. Because the Court erred in rejecting the agreement between plaintiff and defendant.

3d. Because the Court erred in charging the Jury that a forfeiture could not be recovered.

4th. Because the Court erred in charging the Jury, "that the general rule was that notice of non-acceptance or non-payment by the drawee must be given, in order to bind the drawer of a bill, when he was in the habit of drawing, or had reason to expect that his draft would be honored, or when he had funds or a running account with the drawee, or the drawer was present at the drawing of the bill, and assenting thereto.

5th. Because the Court erred in charging that when there were mutual obligations or undertakings, there must be a tender or offer to perform before an action will lie for a breach or refusal to perform.

6th. Because the Court erred in charging the Jury hypothetically, who were misled by said charge.

The Court refused the motion for a new trial, and plaintiff excepted.

CLARK & LAMAR, and PEEPLES, for plaintiff in error.

HULL & HILLYER, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. There is not enough in the Bill of Exceptions to show that any error was committed in rejecting the written agreement; and error must affirmatively appear. It is obvious that the Bill of Exceptions does not disclose the real ground on which the agreement was rejected. The opinion of the Judge refusing a new trial supplies the deficiency, but does not show error; for from that it appears that there was a *subscribing witness* to the instrument. Of course the paper could not go in evidence without resorting to him or accounting for him.

2. One additional view disposes of the whole case. The question is not whether the main contract which the plaintiff and defendant made, is binding or void, but whether this particu

lar part of it, the draft, can be enforced. The test is, was it a real element of the contract, or was it in truth but an exterior appendage to it—a *clasp* to bind it? If the former, it is meritorious and ought to be enforced; if the latter, it is a mere forfeit *without consideration*, and therefore not to be enforced. A contract without consideration will not be enforced, and so any part which can be separated from the rest and shown to be without consideration, will not be enforced. Want of consideration is the foundation of the doctrine that a forfeit cannot be enforced. In this case, there is no consideration, either of advantage to the one or of disadvantage to the other, on which this draft was given. The only evidence on that subject is that it was given *as a forfeit to bind the bargain*—the bargain being *complete* on each side, this provision was superadded as a clasp to bind it. It was added, not to cover damages which the plaintiff might sustain by reason of a failure to perform the contract, but as a penalty, the prospect of which would prevent a failure. It is easy to imagine, and it may be true in point of fact, that damage resulted to the plaintiff from the defendant's failure to perform, but the question is, was this draft intended to cover such damage? The witness says not. He says the intention of it was not to repair the injury of a failure, but to prevent a *failure*.

Judgment affirmed.

OGLESBY *et. al. vs.* OGLESBY.

1. A testator by the 11th item of his Will, gave to his son Thomas, who was a minor, a negro boy named Clark, at \$550, and other property at stated prices and money, making in the whole \$2,384, as stated in the item. By another, the 17th item, was provided: "In the event that any of the negroes herein given to any of my minor children should die, or become of little or no value before such minor becomes of lawful age, then, and in that case, it is my desire, that such deficiency or loss be made up to such child or children so losing, out of my estate." Clark died before Thomas came of age, and at the time of his death was worth \$1,200. *Held*, that the sum to be paid to Thomas in lieu was \$550, at which he was priced in the Will, and not his actual value.

In Equity, in Elbert Superior Court. Decision on demurrer by Judge THOMAS, at March Term, 1860.

This was a bill in Equity filed by Thomas Oglesby against Adkins Oglesby and Claiborne Webb, executors of the last Will and testament of William Oglesby, deceased, seeking the value of a negro bequeathed to complainant by the eleventh item of said Will, which was as follows:

"I give to my son, Thomas Oglesby, a negro boy named Clark, at five hundred and fifty dollars; Henry, a boy, at two hundred and fifty dollars, also two hundred acres of land, more or less, lying above, and adjoining the Dorner tract, herein given to my son Adkins, at three dollars per acre—\$600—and is the balance of the John Hall tract; one horse, saddle and bridle, bed and furniture, and cow and calf, at one hundred and sixty dollars, and also eight hundred and seventy-four dollars in money, when he becomes of lawful age, making in all \$2,384."

The bill further alleges that in, and by the seventeenth item of said Will, testator provided as follows: "In the event that any of the negroes herein given to any of my minor children should die, or become of little or no value before such minor becomes of lawful age, then, and in that case, it is my desire that such deficiency or loss be made up to such child or children so losing out of my estate."

The bill further states that the negro boy, Clark, above given and bequeathed to complainant, died in April, 1855 and was thus entirely lost to him, and that this was before com

Oglesby et al. vs. Oglesby.

plainant attained the age of twenty-one years. That the boy Clark, at the time of his death was about sixteen years old, young, active and likely, and worth the sum of \$1,200. Said Will was made 4th August, 1852, and testator placed the valuation on said negroes mentioned in said Will, for the purpose of making an equal division amongst his children, and was relatively, and for that purpose, just and proper, although far below their real value. The complainant claims that the defendant's executors aforesaid, ought to pay to him the sum of \$1,200, the worth or value of said negro, out of the assets of said estate in their hands, instead of five hundred and fifty dollars, which the bill admits they have paid, in and under the seventeenth item of said Will, to make up his loss aforesaid.

To this bill defendants demurred for want of Equity. The Court overruled the demurrer, and defendants excepted.

HESTER & AKERMAN, for plaintiffs in error.

WARDEN & NELMS, *contra*.

By the Court.—LYON, J., delivering the opinion.

To understand this case as we have decided it, it is necessary that I should state more of the Will than is stated by the Reporter. The 4th item gives to his son Adkins, lands, two male slaves, and perishable property estimated at \$3,000, all of which had been received by the legatee.

The 5th gives to his five grand-children Elizabeth, a negro woman, and some other property, all estimated at \$552, which had been received by the parents of these children, Henry and Elizabeth David, during their life-time, and then to Adkins in trust for them; \$1,750 in money, making in all \$2,310, as stated in the Will.

The 6th give to Claiborne Webb, a son-in-law, a negro woman and man, valued at \$950; some money, (property I suppose,) estimated at \$202 and \$951; in all \$2,113, as stated, all of which had been received by the legatee.

The 7th to William Oglesby, a negro man and boy at \$1,000; some household property and land at \$1,360; in all \$2,360, all received by him.

The 8th gives to William Settle, a man and woman at \$1,100;

Oglesby et al. vs. Oglesby.

perishable property and land at \$560, and \$500 in money; in all, \$2,160, and received, except the \$500 in money.

9th to John Oglesby, land at \$1,374; a man and boy at \$850, a horse, bridle and saddle, bed and furniture, at \$160; making in the whole \$2,384, none received but horse, &c.

10th gives to Adkins, in trust for Susan, two female slaves and one boy at \$850; \$100 in money, or a horse worth that; personal property of the value of \$160, and \$1,374 in money; saddle and bridle only received; in all \$2,384.

11th to Thomas, as stated, \$2,384.

12th to Abda, two male slaves at \$750; land and personal property at \$1,860, and \$274 in money, in all, \$2,384.

13th to Drewry P., two negro boys at \$650; personal property and land at \$1,360, and \$474 in money; in all, \$2,384.

14th to Adkins, in trust for Nancy, a negro woman and girl at \$500; personal property at \$160, and in money \$1,724.

15th directs that the balance of his estate remain on the plantation during the life or widowhood of his wife, until Nancy Ann marries or becomes of age.

18th. It is my Will, that when my daughter, Nancy Ann, marries or becomes of lawful age, that the negroes not herein willed away, and left to my wife, be sold, and the legacies herein given to my daughter, Elizabeth's five children, be paid to them in the manner pointed out in the fifth item of this instrument; and also the money legacies, herein given to my minor children, be paid in the manner, and at the time herein-before pointed out. It is also my desire, that soon after my death, that the shares of my son, in Claiborne Webb, William M. Settle, and my son William, be made up and paid in money equal to the amount herein given to my son John, which was \$2,384.

19th. It is further my Will, that all the balance of my estate, together with what is herein left to my wife during her life or widowhood, except the land, at her death or marriage, be divided among all of my own children, and the children of such of them as may be dead, drawing or being entitled to one share only, except the children of my daughter Elizabeth and the children of my daughter Sarah, wife of Linsey John son, who are not to have any thing in this division; and except also, my son Adkins Oglesby, until all the shares of those hereby entitled are made equal to his, then he, togethe

with all my grand-children, except those herein-before excepted, are to share and share alike."

The Court below, in passing on the question made by the bill upon this Will, held, that the true reading of the 17th item was, that the Executors should make good the loss to complainants, occasioned by the death of the negro boy Clark, according to his real value, or what it would have been had he lived up to the time Thomas Oglesby became of age, in 1855, and not according to that price attached to him by testator; in other words, that as Clark had died, the executors should pay to complainant \$1,200, his actual value, instead of \$550 in place of Clark. Is that the true construction? It is not to be denied but the argument made by Judge Thomas in support of his decision, is a most cogent and plausible one. The most prominent objection to his view of the question is, that he has construed this item without reference to the other great and leading principles and provisions of the Will. Take the two items under consideration by themselves, and without reference to the other parts of the Will, and the other persons interested, it would appear to be the intention of testator that the actual loss sustained by the legatee in consequence of the death of a negro, should be made up to him, and not the mere nominal sum placed on the negro, and named in that item; but that is not the proper way of construing this Will. Each item must be construed with reference to all its parts, so as to get at the true intention of the testator. By reference to the several items of this Will, it will be seen that \$2,384 is the sum given to all the children who were not excluded, and who had not been previously advanced, whether the property or things given preponderated in land, negroes or money, and what the things given at the price put on them by testator; whether of the one or the other, lacked of coming up to that sum, was made up to it in money in every case; to some the legacy was mostly in land, to others, mostly in money, and some one or more negroes were given to each, while none received the same amount in valuation, in money, land or negroes. The only things in which there was equality, was the specific bequest to each of a horse, bridle, saddle, cows, calfs, &c., of the value of \$160, and the amount estimated to each, which was \$2,384; from all these items, it is manifest that he intended to make the specific bequests equal, that is, that all should receive the

Oglesby et al. vs. Oglesby.

same amount or sum, considered as so much money. So, if the several things or amounts which he had previously advanced to his other children, whether of money, lands or negroes, and there was no other equality in these advances than with the bequests to minors, or those who had received nothing, where they fell short, according to his estimate, and they all did so, except Adkins who was in excess; the amount was required by the latter clause of the 18th item, to be made up and paid in money equal to the amount therein given to Thomas, which was \$2,384. Let it be noticed that in this item the deficiency in the advances, or shares of Webb, Settle and William, is the difference in the value the testator places on the property received by them—not its intrinsic or increased value, and the amount; that is the same; not the actual value of the specific things given to John according to his valuation, and that it is to be paid in money. From this we infer that the testator had an object in pricing the property, and that object was to equalize his gifts; that he looked to the sum of the whole as the amount given, and not the specific things. By this arrangement, the testator brings the advances and bequests to all of his children, who participate equally in the distribution, and all do, to that point, except Mrs. Johnson or her children, up to the sum of \$2384, at his estimates, except Adkins, whose advancements amounted to \$8,000. At this point there is a deficiency in the shares of all the legatees to that of Adkins of \$616, and this deficiency, by the provision of the 19th item in the general division, is to be made up to them; Adkins receiving nothing more until all have been equalized with him at that time, then the balance is to be divided equally. Now, is it not apparent from all this that the object of the testator was, that his children should receive an equal amount of his estate considered and valued at the same time? Not that the specific property shall be alike or equal in value, or that the particular property given to a particular child, is any especial manifestation of his regard in favor of such child. The only importance throughout the entire Will, which the testator attaches to the property given, is, as the representation of the amount of money at which he estimates it to bring up the shares to the sum advanced or bequeathed to all alike. Wherever there is a deficiency in the amount received, or to be received by the legatee, occurring in his Will, that testator can fore-

and provide for specially, it is either made up or to be made up in money to a particular cash point. Money with the testator, as with the great bulk of mankind, is the standard by which his affection for his children are measured and displayed. It is with him as it is every where and by every body, the great leveller and equalizer in the account to be taken of men and things, and in the estimate to be put upon property, is the only safe and reliable one. It comes nearer to a fixed and unchanged value than anything else. It is not subject to destruction and fluctuation like other property.

With this view of the Will, considered as a whole, let us look at the particular items, the 17th considered with reference to the complainant, and the death of the boy Clark. The words of the item are, "In the event that any of the negroes herein given to any of my minor children, should die or become of little or no value before such minor becomes of lawful age, then and in that case, it is my desire that such deficiency or loss be made up to such child or children so losing out of my estate." Mark the words: "such deficiency be made up." See the similarity in this provision and that in the 19th item, and the fact existing in every item in the Will where the specific property falls short of the \$2,384. But what is the deficiency, and how is it to be made up? We have seen that testator, without reference to the things given, except as the representative of so much money, equalizes the children at \$2,384; and that is the exact amount which is specially named to Thomas in the 11th item. Clark has died; the testator foresaw that. Now take him out of the item and you have the deficiency which is to be made up to him, and as in every other case, with money, just as the testator would have done if he had not had Clark to put in in the first place. If Clark be taken out, and the price at which he was estimated, complainant will have received \$1,834; the difference between that and \$2,384, the sum intended to be given him, is the deficiency and the amount to be made up, so as to bring his sum again to the same point, \$2,384. This view of the question is conclusive to our minds. Any other would break up the equilibrium or scale of equalization that the testator has, with so much pains and care, set up and maintained throughout the entire Will. For instance, give to Thomas \$1,200 for the loss of Clark, instead of the \$550, and the amount he will receive from the estate will be \$3,034,

Oglesby et al. vs. Oglesby.

while that of the balance will be respectively \$2,884, and that disparity Will continue to the end. The testator never intended this, but that the amount received by his children from his estate should be equal, and that this equality should remain unbroken, although a negro intended for one of the younger children should die before coming to the possession of the child. According to any other rule the misfortune caused by the death of a negro, would fall on the other children, and not on the one to whom bequeathed.

For these reasons, we think, the Court below ought to have sustained the demurrer and dismissed the bill; the amount of \$550 paid by the executors being all that complainant was entitled to under this Will, on account of the loss occasioned by the death of the negro boy Clark. Besides, this view accords with the Law of Advancements upon which testator evidently acted in making these testamentary dispositions, that each child should receive the same amount of property in money, having reference only to the actual value of the thing advanced at the time advanced; unaffected by the diminished or increased value of the thing given. Again, it is in perfect consonance with the Law of Contracts between individuals. If one sells or conveys to another a thing, with the undertaking to make it good in case of loss or destruction, the price named, or at which it was estimated, is the sum to be paid back, without reference to its advanced or diminished value. The Law does not regard the fluctuating value of the thing in controversy, but adopts that which the parties have set on it; and so in this Will, in making good to the complainant the loss sustained by the death of Clark, the Law adopts that sum which the testator placed upon him. It is the only certain and uniform rule by which the Court can be governed.

Judgment reversed

STANFORD vs. MANGIN et. al.

1. A plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of the defendant's title.
2. A deed between private persons conveying all the land on one side of a river not navigable, conveys all that lies on that side, beginning from the middle of the river; or in other words, the term river, when applied to streams not navigable, and used to designate a boundary between private land owners, means in Law the middle of the river.

Ejectment, in Habersham Superior Courts. Tried before Judge HUTCHINS at April Term, 1860.

This was an action of Ejectment brought by John Doe *ex dem.* William H. Mongin and Andrew J. Nichols, against Richard Roe, casual ejector, and John R. Stanford, tenant in possession, for the recovery of five acres of land, more or less, being a portion of lot No. 19, in the 10th district of Habersham county, known as "The Island." Both parties claimed under Benjamin Vaughan, the former owner of the land; the plaintiff, under a deed from Vaughan to William H. Mangin, dated 29th September, 1838, conveying "all that part of Lot No. 19, in the 10th district of Habersham county, situate, lying and being on the west side of the Soquee river; containing 51½ acres, more or less," &c. The defendant claimed under a deed from the executors of Vaughan, dated 5th July, 1839, conveying to John R. Stanford "all that tract or parcel of land situate, lying and being in 10th district of said county, known as part of Lot No. 19 in said district, bounded by and having the following courses and distances," &c.; describing the same particularly, and containing 186 acres, more or less, being the balance of Lot No. 19, not before conveyed to Mangin, and situated on the East side of said river Soquee, and to the middle of said river.

Plaintiff claimed that the land in controversy, now an island, was, at the time of the conveyance and execution of the deed by Vaughan to Mangin, in 1858, on the west side of the river, and embraced in said deed from Vaughn to Mangin. Defendant claimed that at the time of his purchase of all the Vaughn land on the east side of the river, and long before, the land in dispute was an island formed by two chan-

Stanford vs. Mangin et al.

nels of said river, the principal run or channel being on the west side of said island, and that it was therefore included in his deed from the executors of Vaughn. He further relied on the Statute of Limitations.

At the time the Court allowed the plaintiffs to amend his declaration by laying a demise from Peyton L. Wade, Mangin's vendee, without striking out the demise from Mangin, who had been dead long before the commencement of the suit, but holding that no recovery could be had on the demise from Mangin.

When the depositions of John W. H. Underwood were offered to be read on the part of plaintiff, defendant objected thereto, on the grounds:

1st. That he was one of the executors of the estate of James R. Wyley, deceased, under whom plaintiffs claimed; that his testimony is given in support of his own deed made as executor of Wyley to Nichols.

2d. Because he is one of the legatees of Wyley's estate, and therefore interested.

3d. Because, in his answer to the 4th cross interrogatory, he gives reasons not warranted by the conversation referred to, and in his answer to the 5th cross interrogatory, he gives his evidence argumentatively, and answers more than he is asked, and gives his opinion as to the law of the case, citing his authority for it.

4th. Because he testifies to a conversation held with defendant while he was attorney for Wyley, and employed to bring suit for the very premises now in dispute.

Plaintiff executed and tendered a release to Underwood, and the Court understanding that no further objection was made as to the competency on the score of interest, overruled the objection and let in the testimony. To which ruling defendant excepted.

Defendant also objected to the introduction in evidence of a deed from Mangin to Wade, offered by plaintiff, upon the grounds:

1st. That said deed did not state the county in which it was executed, and ought not to have gone to record without proof of when it was executed; and 2d. Purporting to be executed before a Notary Public, his notarial seal should have been attached, and the county of his residence made to appear.

Stanford vs. Mangin et al.

The Court overruled this objection, and defendant excepted.

The evidence being very voluminous, and no motion being made for a new trial, on the ground that the verdict was contrary thereto, it is deemed wholly unnecessary to insert it here.

The testimony being closed, the Court charged the Jury, that the real question in the case was, Where was Soquee river at the time Vaughn made the deed to Mangin? That deed conveys all of Lot No. 19, lying north-west of the river to Mangin. The deed from the executors of Vaughn conveys to defendant all of Lot No. 19, on the south-east side of the river, or all of that Lot which had not been conveyed to Mangin. These two deeds make the river the line between plaintiff's and defendant's land. Then, where was the river? This is a question of fact for the Jury; if you believe from the evidence that the river ran east or south-east of the land, in dispute, at the time the deed to Mangin was executed, and that his title has passed to the plaintiff, and that defendant is in possession, then the plaintiff is entitled to recover; the deed from Vaughn to Mangin being admitted to be older than the one from his executors, under which defendant claims. The defendant, however, denies that the river run on the south-east side of the disputed premises at the date of Mangin's deed, but insists that the main channel was on the north-west side of it, and that his boundary extends to the bank of that channel, and if you believe this, you should find for the defendant.

The defendant further relies on the Statute of Limitations, and that he has had possession of the land in dispute more than seven years prior to the commencement of this suit, and prior to the passage of the Act of 1852. If you believe that defendant possessed and occupied the land under a claim of right, openly, notoriously and continuously for seven years prior to the Act of January, 1858, or that he held and claimed it seven years prior to the commencement of this suit under color of title, then his title is good, and he is protected by the Statute of Limitations, and you should find for him.

The defendant requested the Court to charge that plaintiff's boundary did not extend to the middle of the river, or beyond the north-west bank or margin of this small stream. It is admitted that Soquee river is not a navigable stream. The Court in response to this request charged, that the own-

Stanford vs. Mangin et al.

er of land bounded by a stream or water course, not navigable, owns to the middle of the stream, unless a different intention or boundary is expressed in the deed.

The Court further charged, that if they found for the plaintiff, they should then inquire as to the value of mesne profits to which he was entitled, subject to be lessened by the value of the improvements and clearing. To which charge defendant excepted.

Defendant's counsel requested the Court to charge the Jury:

1st. That if defendant had been in peaceable possession of the premises seven years before suit brought, he was protected by the Statute of Limitations.

This the Court charged, with the addition and explanation as stated in the general charge.

2d. That if defendant had been in possession seven years prior to the conversation with Underwood in 1848 or 1849, then his title was perfect, and the disclaimer testified to by Underwood did not divest or affect said title. And if he had been in possession seven years since said conversation, then he was protected by the Statute of Limitations. The first part of this request the Court refused to charge; the last was given, qualified as in the general charge.

8d. That if Vaughn's title was good for the entire river after he had sold on the west side to Mangin, then they must find for the defendant. This the Court charged, adding, that if the title was not in plaintiff, it made no difference whether defendant owned it or not, plaintiff could not recover.

4th. That if the channel of the river was changed in 1840, then if defendant, Stanford, has been in peaceable possession since, they should find for him. This the Court charged, qualified as in the general charge.

5th. That if the deed of Mongin and Wade were made since the channel of the river has been running on the western side of the island, then the plaintiff has no claim or title to any land east of that channel, because Mangin's deed to Wade is dated 21st January, 1842, and Wade's deed to Wyley is dated 5th January, 1848, and they purport to, and do, convey only the land then lying on the west side of the river. This the Court charged, adding, plaintiff could not recover unless the title to the land in controversy was in him, and referred to the general charge on this subject.

Stanford vs. Mangin et al.

6th. That in order to set up title by possession, it is not necessary that defendant should prove that he cultivated the land every year, or that he cultivated it at all. This the Court charged, with the qualification that he must have had continuous possession.

7th. That if defendant's negroes worked the land even without his permission or knowledge, it amounts to a possession by defendant.

This the Court refused to charge.

That if the plaintiff's title accrued whilst defendant was in adverse possession, then said title is void and of no validity, and defendant is entitled to recover. This the Court charged, adding, that this was the Law then, at the date of plaintiff's deed.

To all which charges, qualifications, and refusals to charge defendant excepted.

The Jury found for the plaintiff the land in controversy and fifteen dollars mesne profits. Whereupon defendant tendered his Bill of Exceptions, assigning as error the rulings, charges and refusal to charge as above stated and excepted.

JOHN R. STANFORD, in *propria persona*, for plaintiff in error.

ROBERT McMILLAN, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

We find no error in this record except in the charge of the Court. We think there was error in the charge, that the real question in the case was, where was Soquee river at the time Vaughn made the deed to Mangin? and in refusing to charge without qualification that the plaintiff could not recover if the channel of the river was on the west side of the island when Mangin made his deed to Wade on the 21st of January, 1842. The plaintiff had a demise from Mangin, it is true, but Mangin was admitted to be dead, and there could be no recovery under that demise, and the presiding Judge had so declared in the hearing of the Jury. The true question, therefore, was not on the demise from Mangin, but on that from Wade, who was the next in succession. It is true, that both plaintiff and defendant showed deeds which, each for his own, claimed

Stanford vs. Mangin et al.

to cover the island, but the real question was, not whether the defendant's deeds covered it, but whether the plaintiff's deed to Wade covered it? The plaintiff had to recover on the strength of his own title and not on the weakness of the defendant's title? The plaintiff's whole title depended on the deed from Mangin to Wade, and if the channel of the river was on the west side of the island when that deed was made, the deed did not cover the island, and the plaintiff could not recover. The Court ought so to have charged.

Judgment reversed.

BLACK AND WIFE *et al.* vs. THORNTON.

1. It is competent for one who was a Sheriff to state from entries on an execution in his own hand-writing, that the property was pointed out and sold as the property of D. T., when that fact appears by the entry, the witness stating that he invariably stated such facts when so in his entries, and never stated anything but facts therein, although he has no recollection of the facts.
2. In a question between persons, one claiming under a voluntary deed, and the other under a purchase, it is competent to prove what was said by such purchaser and others interested in the sale under whom he claims as to outstanding titles, not as conclusive evidence of want of notice, but as parts of the circumstances attending the sale.
3. Possession of a deed by grantees, or one taking interest under it, is presumptive evidence of its delivery in immediate execution of the purposes for which it was made.
4. It is error in the Court to charge the Jury, "that there is a conflict in the evidence," when that is denied, it being for the Jury to determine whether there is in fact a conflict.
5. When there is an apparent conflict between the testimony of one witness and two others, it is error to charge that the Jury are to consider from the evidence whether the two are not mistaken, thus discriminating against the two, especially when the testimony is of the same character and alike impeached on the record.
6. It is error in the Court, in the charge, to give an undue and incorrect weight to a portion of the evidence, and which is in exclusion of other parts equally important.

Trover, in Elbert Superior Court. Tried before Judge THOMAS, at March Term, 1860.

This was an action brought by Lemuel Black and his wife, and Willis Scroggins and his wife, against William T. Thornton, to recover damages for the alleged conversion of certain slaves.

On the trial of the case, the following testimony was adduced:

Evidence for Plaintiffs.

LESLIE H. CLEVELAND testified, under a commission, in answer to interrogatories: That he had seen the paper attached to the interrogatories—a deed of gift from Daniel Thornton

Black and Wife *et al.* vs. Thornton.

to Martha E. Thornton and Priscilla H. Thornton, dated 17th day of November, 1838; that it was signed by Daniel Thornton, in presence of himself and Elijah Jones for the purpose specified in the deed, and they signed it as witnesses all at the same time; it was made for the purpose named in the deed; Joseph Blackwell drew the deed; did not recollect who inserted the 17th day of the month; the deed was signed on the day it bears date, by Daniel Thornton; no one else was present but the maker, Daniel Thornton, the witnesses, Cleveland and Jones; it was done at Daniel Thornton's blacksmith-shop; heard Reuben Thornton say, in conversation with witness, between witness' residence and Elberton, that he had heard of the deed of gift, and wanted the matter settled in the life-time of Sallie Thornton, (Daniel Thornton's widow;) this was several years before her death; the deed was not delivered at the time it was made.

The marriage of plaintiffs, Willis Scroggins with Martha Scroggins (formerly Martha E. Thornton) was admitted.

THOMAS J. HEARD was sworn for plaintiffs, and said: I know the paper shown to me, being the deed of gift; it is the same Mrs. Sarah Thornton gave to me to have recorded in the year 1845, prior to August, according to my best impressions; her husband was then living; Wm. D. Thornton, the husband of Sarah, is reported to be dead, but I don't recollect the time; Sarah Thornton is the mother of Priscilla and Martha Thornton.

The deed of gift, of which the following is a copy, was then read to the Jury:

"GEORGIA, ELBERT COUNTY:

"Know all men by these presents, that I, Daniel Thornton, of the State and County aforesaid, do, for the good will and affection that I have for my grand-daughters, Martha E. Thornton and Priscilla H. Thornton, (daughters of Wm. D. Thornton,) give to them a certain negro woman named Ann and her child Sina and their increase—the said negroes to be used by the said Wm. D. Thornton and his wife for their benefit until the said Martha E. and Priscilla Thornton become of age, &c.

"In testimony whereof, I have hereunto set my hand and

Black and Wife et al. vs. Thornton.

affixed my seal, this 17th day of November, 1838.

"Signed in presence of:

"Test: ELIJAH JONES, } DANIEL ^{his} X THORNTON.
"IRA H. CLEVELAND. } mark.

"GEORGIA, } Clerk's Office Superior Court.
"ELBERT COUNTY. } Recorded in Book Z, folio
198. August 20, 1845.
IRA CHRISTIAN, Cl'k."

JOHN ADAMS sworn, said: Knows a negro woman named Anna, in the possession of Reuben Thornton, in his life-time; I asked Reuben if he knew these children had a deed of gift to these negroes? he said, "Yes;" I said you will lose them; he said, "Never in my life-time;" this conversation was in 1847, '48 or '49; he did not communicate to me how long he had known of the deed of gift; he said he knew at the time he bought them of this deed of gift; I asked him if he knew of this deed of gift at the time he bought them? he said, "Yes;" he named Ann and her children; she had children Sina and Seaborn; knows the names of none of the rest; he did not tell me he knew of the deed of gift at the time he was talking to me, and that he did not know of it at the time he bought them; this he did not say; he said they would be his as long as he lived, and when he was dead and gone, he didn't care much about it.

Cross-examined: Reuben Thornton never named to me how he found out about the deed of gift; I was living at Thornton's as overseer; he did not discharge me; I served my time out; I overated for him three years; it has been twenty years since my hearing first became bad; my hearing is right smart worse now than it was ten or twelve years ago; there aint a great deal of difference between my hearing ten or twelve years ago and twenty years ago; the talk about the deed of gift merely came in conversation; I had heard something about it, and asked him about it; no one else was present; never talked to me about it but once; we were sitting in the piazza; never asked him why he did not find out; did not put myself to that trouble; we talked about a heap of things; I don't recollect of what particularly; I lived at his quarter the last year I stayed with him, and that was the year the conversation took place—towards the last of the

Black and Wife et al. vs. Thornton.

year, as well as I can ascertain; it was at his quarter where I lived that the conversation took place; Ann and her children were at the home house at the time the talk took place; they were at the home house; the quarter was seven or eight miles from the home place.

THOMAS J. ADAMS: Lived with Reuben Thornton as overseer; does not know exactly the years—about 1852, I think; heard him talk of Ann and her children; I was down then at the quarter hauling corn; I told him about there being a deed of gift for these negroes; he said he knew it when he bought them; I asked Reuben Thornton about the negroes, because I had heard Scroggins was about to come up here (to Elberton) to see about the claim to the negroes; the children of Ann were Sina, Bose, Louiana, Robin, Jacob—I don't recollect the names of the others, but there were others; Beasajah, I think, was one of Ann's children; Sina has two or three children, I won't be positive which; I saw Sina the year before last; the balance I don't recollect when I saw them; the time I saw Sina was when I was overseeing for Thomas Thornton, son of Reuben.

Cross-examined: In the conversation with Reuben, he said they would not bother him in his life-time, and signified that after his death he did not care what; that was about the meaning of it; that was all he said about it that I recollect; he did not say he had fairly bought the negroes of David Thornton, nor any thing about buying them.

JOSEPH T. SMITH: Knows nothing about the girl Sina; knows Henry, Jacob, Seaborn, Robin and Louiana; knew them in defendant's possession; he sold them for forty-three hundred dollars; I think that was their value; defendant sold them in January, 1858, I think; knew nothing of the mother of these negroes; it strikes me defendant probably calls Henry Bose, but am not certain of that; Henry was about 18 years old; Jacob was about 16½ years old; Seaborn was about 15; Robin was about 13½; Louiana was about 11 or 11½; I am speaking of their ages at the time they were sold; I am so precise about ages and value because I bought the negroes.

JOHN M. BROWN: I recollect when Mr. Black demanded some negroes of defendant; I think one's name was Seaborn; don't recollect distinctly the other's; there was some two or three names; I think something was said of a negro named

Sina; defendant, I think, did not give up the negroes; could not say what defendant said.

THOMAS J. ADAMS, re-introduced: Went to Thomas Thornton's, defendant's, to oversee Christmas, 1857; Sina was there then; I went after some hogs; she was fixing to try up some fat; she was around the pot with defendant's wife and some other woman.

ANDREW J. CLEVELAND: Knows the negro girl Sina; about two years ago Sina would have brought near \$1,100; I don't know much about the value of negroes; saw Sina, Seaborn and Jacob in the employment of defendant in 1857; I have seen Sina and Jacob plowing; don't know about Seaborn; Bose was Henry's nick-name, but Henry is the right name.

JACOB M. CLEVELAND: Knows Priscilla H. Black; she is Wm. D. Thornton's daughter; she was born in 1834, to the best of my recollection; I know her sister—her name is Martha; 'tis said she married Scroggins; I have seen them associating as man and wife; Priscilla married Black; Scroggins and his wife have lived in this county.

Cross-examined: Scroggins was reputed to have another wife living in Caroline at the time he married Martha Thornton; her maiden name was Newby; he was married to Martha Thornton about ten years ago; I am related to plaintiffs; Martha is older than Priscilla; Martha and Priscilla are my nieces; Martha Scroggins was born in 1830 (in the latter part) or first of 1831.

Re-examined by plaintiffs: My sister, Wm. D. Thornton's wife, brought Ann here on the 1st Tuesday in January, 1829, and a few days after she married Wm. D. Thornton; he kept the negroes a few years, got in debt, and sold them to Beek & Clark; these were sold to Beek & Clark, Ann and another no kin to Ann; Beek & Clark sold Ann to old Daniel Thornton, the father of Wm. D. Thornton; the sale to Daniel Thornton by Beek & Clark was a year or two before the date of the deed of gift; the negro Ann was raised by my father, and sold by me as the representative of my father's estate; old Daniel Thornton has been dead about twelve or thirteen years; his wife was called Sallie; she outlived him some two or three years; he left some property; had two children; had a tract of land; there were conditions about the tract of land. William T. Thornton's father was Reuben Thornton; he has been dead three or four years.

Black and Wife et al. vs. Thornton.

Plaintiffs introduced and read the Will of Reuben Thornton. This gave various articles of property and portions of his estate in specific legacies. None embraced in this suit was thus conveyed. The Will contains an item giving all the balance of his estate to defendant. One negro of this family was bequeathed in the Will to Benjamin Thornton, and the Will was signed by his mark.

The following testimony was offered by Defendant:

WM. H. ADAMS: Held the office of Sheriff of Elbert county in 1841; (a fi. fa. in favor of Wm. B. Davis and John C. ——— on Wm. D. Thornton, Daniel Thornton and James A. Clark was shown to the witness;) have no distinct recollection of fi. fa. itself, but from the entries on it in my hand-writing, I know I had it; I made the levy entered on it; was in the habit of advertising my sales in a paper published in the town of Washington; (a number of the "News and Planters' Gazette" was shown to witness;) this is the paper I supposed the advertisement in; it was caused to be inserted by me; I have no recollection except from my entries, and in that way I think the property was sold as entered on the execution by me, and was pointed out by Daniel Thornton.

Plaintiffs, by their counsel, objected to the foregoing evidence, so far as witness stated facts only from the papers.

The Court decided his statement was not evidence; but the witness having stated he made all the entries on the fi. fa., the returns was evidence. And that as to who pointed out the property, the returns on the fi. fa. did not prove that. Defendant excepted.

The witness continued: I can only state by whom the property was pointed out from the entry; my invariable custom, when the property was pointed out at all, was to say in my levy and advertisement by whom; I am satisfied from what appears here from the papers shown me, that the property was levied on as the property of Daniel Thornton; the entry says the negroes sold for \$402; another negro woman sold the same day, perhaps to A. Hammond, for less than \$400; A bright yellow negro about 22 or 23 brought about \$20 or \$30 more than \$400; Jacob, also Blackwell's property, about 40 years old, full size, and likely of his age, brought

Black and Wife et al. vs. Thornton.

under \$400; I think the woman sold to Hammond had a child at the time; I bought her afterwards, and she had two children; I bought her a year or so afterwards.

Cross-examined: My impression, that it was sold as the property of Daniel Thornton, is founded entirely on the entry on the execution that it was pointed out by him; I stated nothing in my entries but what were facts; don't know that Daniel and Wm. D. Thornton lived together at the time of the levy; never knew them to live together.

JEREMIAH S. WARREN: Have heard a conversation between Daniel Thornton, Wm. D. Thornton and Reuben Thornton about the property on the day of the Sheriff's sale; Reuben Thornton had agreed to furnish money to buy the negroes; rumor said, previous to the day of sale, that the negroes had been conveyed; Reuben Thornton had old Daniel and young Daniel both brought in my presence to say whether the statement was true or not; Reuben Thornton said to them, "I am willing to furnish the money to buy the property, provided there is to be no after-claps about it; but if there is to be, I am not willing to have anything to do with it; both Daniel Thornton and Wm. D. Thornton disclaimed that the property ever had been conveyed, or that there was any conveyance in existence at that time; Reuben also stated that if there was any claim they had better get some body else to buy it; I don't want it, they still answered, and said there was no claim, and said they would rather Reuben would have the negroes than any one else; old Daniel said there had been a conversation about an instrument having been drawn up, and said to young Daniel, "You know about it;" young Daniel said whatever instrument there had been, had been destroyed; I inquired of the parties to know if this instrument of writing was a Will or otherwise; they said it was a Will; I remarked, a party had a right to re-make his Will at any time; old Daniel said he had intended to give that property to William D. Thornton, but he had had debts to pay for him more than the property, and he thought Wm. D. Thornton had ruined him any how; all this took place on the day of sale, in the presence of Reuben Daniel and Wm. D. Thornton.

Cross-examined: I have told all I know about the matter.

Plaintiffs, by their counsel, objected to the admission of the sayings of Daniel Thornton, William D. Thornton or

Black and Wife et al. vs. Thornton.

Reuben Thornton, and to the conversation as stated by Jeremiah S. Warren. Plaintiffs objected to any declarations of Daniel Thornton since the date of the deed of gift from him to plaintiffs, Martha and Priscilla. The objections were taken and urged before the testimony came out and as it was given in.

The Court overruled the objections and admitted the testimony not to prove the truth of what Daniel Thornton and Wm. D. Thornton said, but as a fact to show on the day of the sale, Reuben Thornton was inquiring for information as to the title rebutting the statements of the two Adams; that he knew of the deed of gift at the time he bought the negroes.

The execution with the entries on it, testified to by Wm. H. Adams, was then offered. Plaintiffs, by their counsel, objected. The Court overruled the objection and admitted the papers and entries, and they were read to the Jury.

Defendant offered a copy of the "News & Planters' Gazette" containing advertisements. These were read to the Jury.

Defendant then introduced and read to the Jury a bill of sale from Daniel Thornton to Reuben Thornton, dated the 27th day of April, 1841, and a deed from Sheriff Adams to Reuben Thornton, dated 4th day of May, 1841.

The following is a true copy of the deed, *fi. fa.* and entries—the advertisement in the "News & Planters' Gazette," and of both the deeds to Reuben Thornton:

"GEORGIA, ELBERT COUNTY:

"To all and singular the Sheriffs of said State, greeting:

"We command you that of the goods and chattels, lands and tenements of Wm. D. Thornton, Daniel Thornton and James A. Clark, you cause to be made the sum of two hundred and seventy-two dollars, principal debt, and sixteen dollars and sixty-seven cents, interest, with interest on the principal sum from the 25th day of September, 1840, which Wm. B. Davis and John C. Douglass, bearers, lately in our Superior Court of Elbert county, recovered against them for debt, and also the sum of fourteen dollars thirty-seven and half cents, which to the said William B. and John C., in the said Court and adjudged for their damages as made by reason of their detaining the said debt, as far as their cost

Black and Wife et al. vs. Thornton.

that suit expended whereof the said Wm. D. Daniel and James A. were convicted and liable as appears to us of record, and that you have the said several sums of money before the Judge of our said Court on the third Monday in March next, to render to the said Wm. B. Davis and John O. Douglass the debt and damage aforesaid. And have you then and there this writ.

"Witness, the Honorable Garnett Andrews, Judge of our said Court, this first day of October, 1840.

"IRA CHRISTIAN, Clerk."

"Levied the within fi. fa. on one negro woman named Ann, 20 years old, and her child, a boy named Henry; the property pointed out by one of the defendants, Daniel Thornton. This 10th day of December, 1840.

"W. H. ADAMS, Sheriff."

"Sold the above levied property on the first Tuesday in February, 1841, to Reuben Thornton for four hundred and two dollars, and after deducting levying, advertising fees, and my fee cost for selling, to-wit: sixteen dollars and thirteen cents, and the principal, interest and Court costs of this fi. fa., leaves in my hands of seventy dollars and seventy-seven cents, which is applied to the order of the defendant this 17th March, 1841.

W. H. ADAMS, Sheriff."

"Received of Wm. H. Adams, Sheriff, two hundred and ninety-nine ¹/₁₀ dollars, tax and Jury fee due on this fi. fa., 19th March, 1841.

Y. L. G. HARRIS, Att'y."

"Received of Wm. H. Adams, Sheriff, six dollars and eighty-seven cents, Clerk's fee on this fi. fa., this 19th March, 1841.

WM. B. NELMS, D. Clerk."

"Received of Wm. B. Nelms six dollars and eighty-seven cents, my cost on this case, 22d April, 1841.

IRA CHRISTIAN, Clerk."

"NEWS & PLANTERS' GAZETTE,

"Washington, Wilkes County, Ga., January 1st, 1841.

"ELBERT SHERIFF'S SALE IN FEBRUARY.

"Will be sold at the Court-house door in Elbert county,

Black and Wife et al. vs. Thornton.

on the first Tuesday in February next, within the legal sale hours, the following property, to-wit: one negro woman by the name of Ann, about 20 years old, and her child, Henry, an infant. Levied on as the property of Daniel Thornton to satisfy a fi. fa. issued from the Superior Court of Elbert county in favor of Wm. B. Davis and John C. Douglass vs. William D. Thornton, Daniel Thornton and James A. Clark. Property pointed out by Daniel Thornton. This 25th Dec., 1840. WM. H. ADAMS, Sheriff."

"GEORGIA, ELBERT COUNTY:

"Received from Reuben Thornton six hundred and two dollars, in full payment for a negro woman by the name of Ann, about the age of 19 years, a negro girl by the name of Sina, aged about three years, a negro boy by the name of Henry, aged about two months, which negroes I will forever warrant unto the said Reuben Thornton, his heirs and assigns against the claims of myself and all other persons, and I, the said Daniel Thornton, will warrant the said negroes to be sound both in body and mind. In testimony whereof, I have hereunto set my hand and seal, this 27th day of April, 1841.

"WM. B. ALEXANDER, } DANIEL ^{his} THORNTON."
 "WM. J. ROEBUCK, J. I. C. } mark.

"GEORGIA, ELBERT COUNTY:

"Whereas by virtue of writ of *fi. fa.* to me directed from the Superior Court for said county, in favor of William C. Douglass and Wm. B. Davis vs. William D. Thornton and Daniel Thornton, and James A. Clark, security, I have lately levied said fi. fa. on one negro woman by the name of Ann, aged nineteen years, and one negro boy by the name of Henry, aged two months, the sale of said negroes being advertised, according to Law, was, on the first Tuesday in February last past, exposed to sale, at the Court-house door in said county, and Reuben Thornton being the highest bidder, said negroes were knocked off to him for the sum of four hundred and two dollars, in hand paid. I therefore defend the right and title to the said negroes unto the said Reuben Thornton, his heirs and assigns, so far as a Sher

Black and Wife et al. vs. Thornton.

is, by Law, bound to do, and no farther. This 4th day of May, 1841.

"Given under my hand and seal, in presence of

"THOMAS JOHNSON, J. I. C.

"WM. H. ADAMS, Sheriff [L.S.]

"STATE OF GEORGIA,

"ELBERT COUNTY.

} Clerk's office Superior Court.

} Recorded the 30th Dec.,

} 1851, in Book A. A., folio

} 279.

"WM. JOHNSTON, Clerk."

Defendant closed.

Counsel for both parties addressed the Jury, and the Court charged them as follows:

"GENTLEMEN OF THE JURY:

"The plaintiffs, Black and his wife, and Scroggins and his wife, claim the negroes in controversy under a deed of gift made by Daniel Thornton on the 17th of November, 1838. The first point of inquiry is, Did Daniel Thornton own the slaves, Ann and her child Sina, at the date of the deed? If he did, did he have a right to convey said slaves and their future increase by deed of gift? The next point is, Are Priscilla H. Black and Martha E. Scroggins the Priscilla H. Thornton and Martha E. Thornton mentioned in the deed? If you believe, from the testimony, these females are the daughters of William D. Thornton mentioned in the deed, then they and their husbands are entitled to assert, in a Court of Justice, whatever right the said females have under the deed of gift.

"The foundation of the plaintiffs' cause is the deed of gift which has been admitted in evidence for your consideration. Is that deed genuine, and was it made by Daniel Thornton, as it purports to be, and at the date thereof? If so, its effect in Law is to convey an estate for years to Wm. D. Thornton, his wife, and after that, to the two daughters in fee simple. I charge you further, as matter of Law arising from this paper purporting to be a deed of gift, that the estate for years in Wm. D. Thornton and his wife was to last until the youngest of the two daughters became of the lawful age of 21 years. Neither, by the deed, can take until both are of

Black and Wife v. Daniel Thornton.

lawful age. Therefore, the Statute of Limitations would not run against either daughter until both are of lawful age; and hence, if you believe this action was brought within four years after the younger daughter became of the age of 21 years, neither of the daughters are barred of their rights by the lapse of time.

"The next point to be considered is, Had defendant converted the negroes to his own use before this suit was brought within four years? and does he hold them under the Will of his father? Selling the negroes would be converting them, working them as his own would be converting them, and a demand for them by plaintiffs, or either, and refusal to deliver them by defendant, if he had them at the time, would be evidence of conversion to defendant's own use, and sufficient evidence, if there be no evidence to contradict it. Now, gentlemen, does the evidence show all these points to exist in favor of the plaintiffs, according to the case already stated to you by the Court? If the Law and evidence do show, then, these points in plaintiffs' favor, you are to find for the plaintiffs the proven value of the slaves, together with reasonable hire, according to the evidence, for the time the defendant had them (the slaves) in possession, and since he sold them, if you believe he sold them, unless the defendant has shown some lawful ground to defeat the plaintiffs' claim, and of this, whether he has shown any lawful ground, you will next inquire. The defendant contends that the deed of gift, if it ever existed, was not delivered to the parties, or to either of them, until after it was sold by the Sheriff as the property of Daniel Thornton, and until after Daniel Thornton conveyed it to Reuben Thornton. The Law on this point is, "that a deed of gift is of no effect or validity until it is delivered either to the parties in interest or to some one of them, or to some one else for them. It can only convey property or rights from the time of delivery, and not from the time of its date." Therefore, if you believe, from the evidence, the sale was made by Sheriff Adams or by Daniel Thornton to Reuben Thornton, or by either of them, and that such sale was made before the deed was delivered to the parties in interest, or some one of them, or some one else for them, then the plaintiffs cannot recover in this case, whether Reuben Thornton had notice of the deed or not. But the truth of this, as well as all other facts in the case, is a matter entirely for

your consideration. The next lawful ground on which the defendant contends the plaintiffs are not entitled to recover is, that even if Daniel Thornton did convey to plaintiff the property in the year 1838, and even if the deed was then delivered, still, if Reuben Thornton afterwards bought at Sheriff's sale, or from Daniel Thornton, for a valuable consideration, without notice of the previous gift, he, (Reuben Thornton,) by such subsequent purchase, took a good title to the negroes in dispute. This is the position contended for by the defendant's counsel. The Law on this point is this: When a party takes or claims property under a deed of gift, he or she is what the Law calls a volunteer; that is to say, they paid nothing for what they claim; such a party—that is to say, a volunteer, must yield to a party claiming under a subsequent or younger conveyance for valuable consideration, without notice of prior claim. If he had notice of the prior deed of gift, then the Law does not require the volunteer to yield to him. Notice may be actual or constructive. If the party claiming under the deed of gift records it, or if it is recorded according to Law, this is constructive notice, and is sufficient notice; but there is no evidence that Reuben Thornton had such constructive notice. Actual notice is actual information conveyed to defendant personally of the existence of the prior deed of gift. The question for you is, Did Reuben Thornton have this actual notice? John Adams and Thomas J. Adams both state, in substance, that Reuben Thornton said he had this actual notice. Do they speak the truth, and were they not mistaken? The testimony which conflicts with the testimony of the two Adams, is the testimony of Jeremiah S. Warren. You recollect what it is you are to consider—this conflicting evidence, and all the circumstances and appearances of the two Adams' testimony, and of Jeremiah S. Warren's testimony, and say, are you satisfied, to a reasonable certainty, that the Adams spoke the truth, and that they are not mistaken as to what Reuben Thornton said?

“If you are satisfied, then, that Reuben Thornton had actual notice of the prior deed of gift, and defendant (if he took by gift or bequest from Reuben Thornton) cannot defend himself on the ground that his father bought for money, without notice; if you are not satisfied as above stated, of the truth of the Adams' statements, then, if Reuben Thorn-

Black and Wife et al. vs. Thornton.

ton purchased for valuable consideration, as stated, from the Sheriff, and from Daniel Thornton, or either of them, then his son has a good title against the deed of gift. You must come to your decision from the evidence and the Law, as given you in charge, and from no other source.

"You must understand the Court as expressing no opinion whatever as to the facts of these. You alone must judge—you must consider the whole evidence and weigh it, when conflicting, and base your decision on the preponderance of evidence. You must not believe one fact to be true, beyond a reasonable doubt, in order to find it true, but you must believe it only to a reasonable certainty. The actual notice required by Law to make valid the subsequent purchase contended for by Reuben Thornton, must be given at, or before his purchase. No notice given to him after his purchase would invalidate his purchase.

"A mere rumor brought to the knowledge of Reuben Thornton, at or before sale, or general report that there was an outstanding claim or conveyance, without defining what sort of conveyance or claim, to whom or who by, is not notice to Reuben Thornton, and especially when he inquires of them most apt to know the truth, and receiving no intelligence except that no claim or conveyance existed. The negroes mentioned in the deed are only Ann and her child Sina. If plaintiffs have made out their claim, and right to recover Ann and Sina according to Law and evidence, they have an equal right to recover their natural increase, all of it that you believe to have been in defendant's possession, or converted by him to his own use, before the bringing of this suit.

"The fact that that delivery is not mentioned in the deed, does not invalidate it. The Jury must decide from the evidence whether it was delivered or not. The fact that it comes into Court in the possession of a party entitled under it, is evidence that it was delivered. It is important, however, to decide in this case whether the deed was delivered before 1841 or not. Now, the Jury must get at that fact by the circumstances of the case which bear on the point. What was the purpose of the deed? how far apart did the donor and donee live? and all the circumstances which go to show an early or late delivery. If it was delivered to Wm. I. Thornton, or either of his daughters named in it, that would

be a good delivery as to all parties lawfully entitled under the gift.

"The counsel for the defendant requested me to charge you, 'when the testimony is conflicting, the Jury may consider which is the more probable, and decide accordingly; They shall also take into account the capacity and intelligence of the different witnesses, and if they believe that one of the witnesses was called by the parties at the time of the transaction, to bear witness to it, or was deliberately consulted by them, such circumstances entitle his testimony to special weight.' I charge the above, all but the last, that such circumstances entitle his testimony to special weight; and instead of that, say that his being called on is a circumstance for the Jury to consider in favor of giving it special weight. The true issue between the witnesses—the Adams and the witness Warren—is, not whether Warren heard what he related, because no witness contradicts him, but whether the facts stated by him, to-wit, in substance: that Reuben Thornton was inquiring for information about prior claims to the negroes, are sufficient to make you believe that the Adams did not speak truly, or were mistaken in the matters stated by them.

"I am asked by plaintiffs' counsel to charge: If Reuben Thornton had notice of the prior conveyance, although it was denied by Wm. D. and Daniel Thornton, still, he is bound by the notice, and did not get a good title by the purchase. The Jury are to determine whether he had this notice or not by all the facts of the case.

"I charge you this is the Law," and in this connexion the Court read to the Jury again that part of the written charge, showing the difference between rumor or report, and notice.

Counsel for plaintiff requested the Court, in writing, to charge the Jury:

"If the voluntary deed from Daniel Thornton to plaintiffs was found in the custody of Sarah Thornton, Wm. D. Thornton's wife, after its execution, it is to be presumed that it was delivered properly, and in immediate execution of the original purpose, unless this presumption is rebutted; and by the circumstances and testimony of which, the Jury is to judge."

This charge the Court refused to give as especially not proper in this case, one of the subscribing witnesses having been examined as to execution and proving delivery.

Black and Wife et al. vs. Thornton.

Counsel for plaintiffs further requested the Court to charge the Jury:

"The Jury must be satisfied from the circumstances sworn to and in evidence, that the deed from Daniel Thornton to plaintiffs was made with intent to defraud creditors or subsequent purchasers before they can set it aside, even if there were no notice, a purchaser at Sheriff's sale being bound to look to his title, and purchases at his peril."

This request to charge, the Court read to the Jury, and refused to give it, but charged them, in immediate connexion:

"When a party takes or claims property under a deed of gift, he or she is what the Law calls a volunteer; that is to say, that they pay nothing for what they claim. Such a party—that is to say, a volunteer, must yield to a party who claims under a subsequent or younger conveyance for valuable consideration without notice of the prior claim."

To which charge and refusal to charge plaintiffs excepted.

The Jury retired, and after consultation, returned a verdict for the defendant.

Plaintiffs moved for a new trial on the following grounds:

1st. That the Court erred in admitting the testimony of Wm. H. Adams, so far as he stated facts, only from the papers submitted, and allowing the said Adams to state his opinion that Daniel Thornton pointed out the property, and that he was satisfied from what appears here from the papers that the property was levied on as the property of Daniel Thornton.

2d. That the Court erred in admitting the conversation and statements made by, and had between Daniel Thornton, William D. Thornton, Reuben Thornton and Jeremiah S. Warren, as stated by Judge Warren, and in admitting the statements of Daniel Thornton on that occasion.

3d. That the Court erred in refusing to charge the Jury as requested by plaintiffs' counsel, that "if the voluntary deed from Daniel Thornton to the plaintiffs was found in the custody of Sarah Thornton, Wm. D. Thornton's wife, after its execution, it is to be presumed it was delivered properly, and in immediate execution of the original purpose, unless this presumption is rebutted and ascertained by the other circumstances in testimony, of which the Jury is to judge."

4th. That the Court erred in refusing to charge the Jury as requested by plaintiffs' counsel, "that the Jury must be sat-

inferred from the circumstances sworn to and in evidence that the deed from Daniel Thornton to plaintiffs was made with intent to defraud creditors or subsequent purchasers, before they can set it aside, even if there was no notice, purchasers at Sheriff's sale being bound to look to his title and purchases at his peril; and in charging the Jury: "When a party takes or claims property under a deed of gift, he or she is what the Law calls a volunteer; that is to say, they paid nothing for what they claim. Such a party—that is to say, a volunteer—must yield to a party who claims under a subsequent or younger conveyance for valuable consideration with notice of the prior claim.

5th. The Court erred in charging the Jury as follows: "The testimony which conflicts with the testimony of the two Adams is the testimony of Jeremiah S. Warren," and in saying, or intimating, that "there was any conflict between Warren and the Adams, and not leaving the whole subject, as to the conflict between the witnesses, so far as the facts were concerned, to the Jury.

6th. The Court erred in charging the Jury, "that you are to consider the conflicting evidence and all the circumstances and appearances of the two Adams' testimony, and of J. S. Warren's, and say are you satisfied to a reasonable certainty that the Adams spoke the truth, and were they not mistaken as to what Reuben Thornton said? If you are satisfied Reuben Thornton had actual notice of the prior deed of gift, and defendant, if he took by gift or bequest from Reuben Thornton, cannot defend himself on the ground that his father bought for money, without notice. If you are not satisfied as above stated of the truth of the Adams' statements, then, if Reuben Thornton purchased for valuable consideration, as stated, from the Sheriff and Daniel Thornton, or from either of them, then his son has a good title against the deed of gift."

7th. The Court erred in refusing to give the within charge requested by plaintiff's counsel without the modifications made by the Court in writing.

8th. The Court erred in charging the Jury: "If the party claiming under the deed of gift records it, or if it is recorded according to Law, this is constructive notice, and is sufficient notice. But there is no evidence that Reuben Thornton had such constructive notice. Actual notice is actual inference

Black and Wife et al. vs. Thornton.

tion conveyed to defendant personally of the existence of the prior deed of gift."

9th. The Court erred in charging the Jury as follows: "A mere rumor brought to the knowledge of Reuben Thornton at or before sale, or general report that there was an outstanding claim or conveyance, without defining what sort of a claim or conveyance, to whom or who by, &c., is not notice to Reuben Thornton, and especially when he inquires of them most apt to know the truth, and receiving no intelligence, except that no claim or conveyance existed."

10th. The verdict is contrary to the charge of the Court.

11th. The verdict is contrary to the evidence.

12th. The verdict is strongly and decidedly against the weight of evidence.

The Court refused the new trial, and that is the error assigned.

VANDUZER, HUTCHISON, and WADSWORTH & NEILS, for plaintiffs in error.

HESTER & AKERMAN, contra.

By the Court.—LYON, J., delivering the opinion.

We think the testimony of the witness, William H. Adams, was legal and admissible. He says the entries are in his hand-writing; that he has no recollection of the transaction; that he can only state by whom the property was pointed out from the entry. His invariable custom, when the property was pointed out at all, was to say in his levy and advertisement by whom; that he is satisfied from what appears from the papers shown him, that the property was levied on as the property of Daniel Thornton. His impression, that the negroes were sold as the property of Daniel Thornton, is based entirely on the entry on the execution; that it was pointed out by him. He stated nothing in his entries but what were facts. The rule on this subject, as stated by Mr. Greenleaf, is this: "If the party who made the entry is dead, or being called, has no recollection of the transaction, but testifies to his uniform practice to make all his entries truly and at the time of each transaction, and has no doubts of the accuracy of the one in question, the entry is unimpeached is con-

aided sufficient, as original evidence, and not hearsay, to establish the fact in question." 1 *Greenleaf on Ev.*, §116; also, *Williams vs. Kelsey & Halstead*, 4 *Ga.*, 378. But why was not the bill of sale made by the witness, as Sheriff, under this sale, accompanied by the execution with the entries in question, sufficient evidence of the fact in controversy; without further proof?

2. The conversation and declarations between and among Reuben, Daniel, and William D. Thornton, in respect to an outstanding title or claim to the negroes, and on the day of the Sheriff's sale, as testified to by the witness, Jeremiah Warren, was not objectionable. It was certainly competent for the defendant to show that Reuben Thornton bought without notice, if he could, and how he could do so otherwise than by showing what was said and done by Reuben Thornton and others interested in the sale, at and before the sale, I cannot very well see. It is not hearsay evidence only, but not, a part of the circumstances surrounding and attending the sale and purchase. The testimony was certainly proper to go to the jury. But what it was worth or what it proved, is a very different question, as we shall see.

3. The plaintiffs were entitled to the charge requested; that is, that possession of the deed having been shown in the wife of William D. Thornton, one who took an interest under it, it is to be presumed that it was delivered properly and in immediate execution of the original purpose." The delivery of a deed may be inferred from its possession by the grantee. The evidence of one of the subscribing witnesses to the deed was, "that the deed was made for the purposes named and specified in the deed." The fact that the deed did not actually pass out of the possession of Daniel Thornton at the time of its execution, does not affect the title or the presumption of delivery arising from the subsequent possession of the deed by the grantees. That fact—the retention of the deed by him at that time—is fully accounted for by the additional fact, testified to by the witness, that none of the grantees or persons taking an interest under the deed were present to receive it. The natural and legal presumption arising from the facts as proven, is, that the deed was actually delivered to the grantees or some one of them as soon after its execution as it could conveniently be done; and that when so delivered, it related back to the date of

Black and Wife et al. vs. Thornton.

signing and sealing. *Bushin vs. Shield & Bell*, 11 Ga. 649; 4 *Kent*, 455, note a; *Burns vs. Winthrop*, 1 John. Ch., 329.

We were not certain that we fully understood the point made, or intended to be made, in the request as stated in the fourth ground of motion for new trial, and if we did properly understand it, the Court were not fully agreed upon it; so we concluded not to pass upon it, but to leave it an open question.

4. The Court below erred in charging the Jury, "that the testimony which conflicts with that of the two Adams, was that of Jeremiah Warren. The conflict being denied in this case, it was a question for the Jury to determine, and not the Court.

The Court further charged the Jury, in immediate connection with the foregoing charge: "You are to consider the conflicting evidence and all the circumstances and appearance of the two Adams' testimony and of Jeremiah S. Warren's testimony, and say, are you satisfied, to a reasonable certainty, that the Adams spoke the truth, and that they are not mistaken as to what Reuben Thornton said?" This charge is also excepted to, and we think the exception well taken. The form in which the proposition was put to the Jury discriminated against the testimony of the Adams. This ought not to have been done, for all the witnesses testified to admissions and declarations; each had to depend upon his memory of what was said in their presence and hearing, and why may not Jeremiah S. Warren's recollection have failed as that the Adams' should? The record shows no reason. There were two witnesses against him, and, so far as anything appears to us, they were equally entitled to credit.

The weight of the testimony was against that of the witness Warren, because they supported and corroborated each other, while Warren's stood alone; that is, allowing that there was a conflict. But was there in fact any conflict between the testimony of these witnesses? We do not think there necessarily was. The testimony of all the witnesses may have been true. Notwithstanding the conversation to which Mr. Warren testified, Reuben Thornton may have known all about the deed of gift on which plaintiffs rely. After that conversation, and before the purchase, he may

Black and Wife vs. M. Thornton.

have heard exactly how the matter stood. He may, in fact, have known at the time. The Court ought to have charged the Jury on this subject, that it was their duty to reconcile this testimony if they could, so that the whole might stand, if possible; but if irreconcilable, then, the witnesses being equally entitled to credit, they must find according to the weight of the evidence, of which they are to judge.

We agree with the Court below, that "a mere rumor brought to the knowledge of Reuben Thornton at or before the sale, or general report that there was an outstanding claim or conveyance, without defining what sort of conveyance or claim, to whom or who by, &c., is not notice to Reuben Thornton;" but when he adds, "especially when he inquires of those most apt to know the truth, and receiving no intelligence, except that no claim or conveyance existed," we differ with him. This may be true as a general proposition, but when considered in reference to the facts of this case, it is not true. There was no evidence before the Court that the notice Reuben Thornton had received was mere loose or vague rumor. The testimony of Mr. Warren is, that "Reuben had agreed to furnish money to buy the negroes. 'Reuben said previous to the day of sale, that these negroes had been conveyed.' This implies that he knew or had heard more about this deed than a mere vague and loose report or rumor: he said that they had been conveyed. He had old Daniel and William D. brought into his presence to say whether the report was true or not. Now, if Mr. Thornton had heard about this conveyance previously, how did the denial of Daniel or William D. aid him, or why did he depend upon that information at that time? for both of these men were interested in misleading him; or how does it appear that what he had heard about the conveyance was a vague and loose report? It is due to the Court below to say, "that in his charge he did tell the Jury, if Reuben Thornton had notice of the deed, although it was denied by Daniel and William D., that he would be bound by the notice, and the Jury was to determine from all the facts of whether he had the notice," but when he connected his understanding of the effect of Warren's testimony with that of a report or rumor as notice, as I have already shown, he gave to that evidence an importance and bearing to which it was not entitled, and which was well calculated to mislead the Jury. The whole sense of

Blank and Wife et al. vs. Thornton.

the charge is, that Mr. Warren's evidence showed that Reuben Thornton bought without notice, or at least without such notice as would affect his title; while, in the opinion of this Court, that evidence was strongly corroborative of the evidence of the Adams, that he did have sufficient notice before the sale to put him on his guard and to buy at his peril.

Should we be mistaken in this, however, still, there is nothing to show that after that he did not get full notice before he bought. Then, there was another and a very significant fact in the testimony which the Court lost sight of. I allude to the warranty from Daniel to Reuben Thornton, dated 27th April, 1841, just after the Sheriff's sale, for the identical negroes, and one other. If Reuben Thornton got a good title by the Sheriff's sale free of notice, why take another and a warranty from Daniel for the same negroes? All the presumptions arising from these facts were excluded by the direction given.

The evidence is strong—very strong—that Reuben Thornton bought with notice.

As the case goes back for a new trial, we have not felt it necessary to pass upon the question, whether the verdict is against the evidence, for on the next trial the evidence may be very different.

Judgment reversed.

DICKENS vs. THE STATE OF GEORGIA.

1. It is error in the Court to charge the Jury in a criminal case, that the defense, if successful, would, in his judgment, be based on the violation of a solemn oath they had taken, that he is "constrained to warn them, that to acquit the prisoner on such a ground, that ignorance of the existence of a law is a good excuse for its violation," would be a violation of their oaths as Jurors.
2. The right of the Jury to judge of the Law being secured by Statute, must not be impaired by denunciation of the Court, that if they do so and acquit the prisoner, they would violate their oaths as Jurors.

Misdemeanor, in Hancock Superior Court. Tried before Judge THOMAS, at December adjourned Term, 1859.

The plaintiff in error was indicted for selling whisky in a quantity less than one gallon, without taking the oath required by Law.

On the trial, WILLIAM TYAS testified: That defendant sold him a quart of whisky; he wanted to buy a less quantity, but she said she could not sell a less quantity, because it was against the Law.

Defendant introduced no testimony, but her counsel insisted before the Jury that if they believed that she did not intend to violate the Law, they might acquit.

Upon the subject of the defense, the Court charged as follows:

"The defense set up here, to-wit: that the defendant was ignorant of the existence of the Law which she is charged with violating, will, in my judgment, if successful, be based on the violation of a very solemn oath you have taken. Ignorance of the existence of a Law is not, and has never been held, so far as I know, to be an excuse for its violation. To establish such a principle would be to uproot and destroy the protection of society, and render nugatory, in a great sense, the criminal laws.

"It is argued before you that intention is a necessary ingredient of crime. This is true, and you must be satisfied that when the defendant sold the liquor she intended to sell liquor. But it is not necessary to show that she knew that selling liquor was criminal. If she knew she was selling liquor, the intention existed. If she believed at the time

Stakens vs. The State of Georgia.

she was selling beer, or coffee, or water, then the intention would not exist.

"You have been told you are judges of the Law: This is true, and in judging the Law, you are independent of the Court. You undoubtedly have the power to judge the Law and say that ignorance of the existence of a Law is a good excuse for its violation; but I am constrained to warn you that to acquit this defendant on such a ground would be a violation of your oaths as Jurors; and to put her acquittal on such a ground would be no better than to find her not guilty, because she wears a red shawl. Such a consideration as ignorance of the Law can only be entertained by the pardoning power, which it is unlawful for you to exercise.

To this charge the defendant excepted, and assigns the same as error.

A. H. STEPHENS, for plaintiff in error.

BURCH, Solicitor General, represented by AKERMAN, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

The plaintiff in error, without license to retail, and without taking the affidavit required by the Act of 29th December, 1839, (*Cobb*, 1039,) "not to sell or furnish spirituous liquors to slaves, without an order, &c.," sold a quart of whisky, for which she was prosecuted and convicted.

Under the Law, as it existed previously to the Act of 1833, persons could sell liquor in quantities of a quart and over without license. But that Act, for the purpose of suppressing the traffic in liquor with slaves, introduced this change in the old Law: "that all venders of liquors in less quantities than a gallon should take the oath" prescribed by that Act, whether they had license to retail or not. The plaintiff in error seems to have been ignorant of this change in the Law—not a very uncommon thing, by the way—and was entirely innocent of an intention to violate the Law; for the person to whom she sold the whisky, wanted to buy a less quantity, but she would not sell it, saying that "was against the Law. On the trial, she rested her defense upon the want of intention to violate the Law, under the provisions of

the Penal Code: "that the Jury, in criminal cases, were judges of the Law and the fact." (Cobb, 885.) And, "A person shall not be found guilty of any crime or misdemeanor, committed by misfortune or accident, and when it satisfactorily appears that there was no evil design, or intention, or culpable neglect." (Cobb, 779.)

The Judge charged the Jury, "that the defense, if successful, would, in his judgment, be based on the violation of a very solemn oath they had taken;" that he was "constrained to warn them, that to acquit the defendant on such a ground; that ignorance of the existence of a Law is a good excuse for its violation, (not exactly the ground of defense,) would be a violation of their oaths as Jurors." In this we think the Court committed error.

The right of the Jury to judge of the Law, and to acquit or convict as they shall judge, is guaranteed to them and the prisoner by the Statute of the State, to which we must all bow, and that right must not be abridged, weakened or thwarted by the thunder of the Court in their ears; that if they should take a different view of the Law to himself, that they will, in so doing, violate their solemn oaths as Jurors.

The Court must impartially and dispassionately instruct the Jury as to the Law of the case, and leave them free in the exercise of their right and duties under that Law and the facts, to convict or acquit, as they shall conscientiously judge. I agree with the Court below, that the intention is manifested by the act; that ignorance of a Law is no excuse for its violation, and that when a Jury capriciously acquits one palpably guilty of a crime, that they violate their oaths and solemn duties to the Law and the country, and that when they do so, there ought to be no harm in telling them so. But this cannot be done without crippling, if not destroying, a principle that the Law for wise purposes has lodged with the Jury.

The 10th sec. of the 1st div. of the Penal Code, (Cobb, 779,) referred to by counsel in the defense, and quoted above, does not apply to cases of this kind, but to those cases only where the crime was committed by misfortune or accident, and without any evil design, intention or culpable neglect—both things misfortune, or accident—or without evil design or intention concurring in the perpetration.

Judgment reversed.

Oglesby and Wife vs. Hall.

OGLESBY AND WIFE vs. HALL.

1. O. permits his wife to sell cakes, &c., on her own account, from the earnings of which she buys a negro, taking the title in her own name, by his consent. She keeps and holds the negro as her separate property, paying the taxes all the time: *Held*, that the negro vested in the wife as her separate property against her husband, and one claiming under him as a volunteer.

In Equity, in Elbert Superior Court. Decision by Judge THOMAS, at March Term, 1860.

This was a bill filed by James C. Hall, against James Oglesby and Sarah Oglesby, his wife, the statements of which are substantially as follows:

That on the 20th August, 1868, the said James Oglesby executed and delivered to complainant his certain deed, whereby he gave and conveyed and delivered to complainant a negro woman named Mary, and her four children, together with their future increase, in trust, to hold the same for the joint use of the said James Oglesby, and Sarah, his wife, for and during their joint lives, and for the sole and separate use of the survivor, during his or her life, and at and upon the death of the survivor, remainder to complainant in *fee-simple* forever.

The bill further states that said James and Sarah have said negroes in their possession, and that complainant has reason to believe, and does believe, that they are preparing, and have it in contemplation, to remove said negroes clandestinely beyond the limits of the State, and thereby endangering the rights of complainant as remainderman in and under said deed, and subjecting him to serious and total loss, unless a writ of *ne exeat* or *quia timet* do issue, securing said negroes to complainant after the termination of the life-estate.

The bill suggests and prays that, owing to the condition of said negroes, consisting of a woman and four small children, that they be sold and the proceeds of sale be invested, and the interest thereon be paid annually to defendants during their joint lives and the life of the survivor, and then the principal be paid to complainant as absolute owner thereof.

The bill prays that defendants be enjoined from removing or running said negroes, and that, in the meantime, said

Oglesby and Wife vs. Hall.

slaves be secured to answer the final order or decree in the premises, and that they be sold and the proceeds be invested and applied as aforesaid.

The deed under which complainant claims, was annexed as an exhibit to the bill, and its only consideration is expressed to be love and affection.

The bill was sworn to, and received the sanction of the Chancellor, who ordered the injunction to issue, and that defendants be arrested and held in custody until they give bond and security therefor.

Under the processes issued upon the Judge's fiat, the Sheriff seized upon and took into his possession the negroes referred to in the bill.

Mrs. Oglesby filed her separate answer, in which she states that she had no knowledge of said deed until sometime after its execution; a short time since, her husband admitted the fact to her that there was such a deed, but said that complainant had frequently urged him to make the deed, and finally got him intoxicated, and then procured and got him to sign the same. She denied that her husband had any right, power or authority to execute a deed conveying said negroes, they being her own separate property and estate, purchased with her own money, and set apart to her. The circumstances under which she became possessed of said slaves are about as follows: In 1847 she and her husband moved to her brother's in Clark county, and by their and his consent, respondent sold cakes for her own benefit (her husband being almost helpless) until she obtained a little money, which she deposited in the Bank in Athens, to her own credit. She continued thus to deposit her small earnings until December, 1849, when she, in her own right, from her small earnings thus saved, purchased from James Daniel the negro woman Mary, for five hundred and fifty dollars. Of this she paid, in cash, \$367, and for the balance she gave her individual note, with her brother, George Booth, as her security, and which note her brother paid off with money furnished to him by respondent, and which she made in the same way — by selling cakes, &c.; that the bill of sale made by Daniel was to respondent, and expressed to be, and was for the consideration of \$550 received from respondent, and to which was added by Mr. Daniel the following: "This bill of sale, made to Sarah Oglesby, by request of James Oglesby, her

Oglesby and Wife vs. Hall.

husband;" that her husband always recognized and declared this to be the separate and individual property of respondent, laying no claim thereto; she submits that this was substantially the creation of a sole and separate estate in herself, and that a Court of Equity will uphold it as such and protect her rights therein, notwithstanding the absence of a trustee; she denies that she intends running off said negroes, but admits that she has it in contemplation to remove from Elbert county, to escape from the attempts and snares of others to impose upon an imbecile husband, and where she has no brother or near relative to protect and defend her; that she has always had possession of, and paid the taxes upon these negroes, and that her husband never returned them as any part of his taxable property or claimed them as his.

JAMES OGLESBY, the husband, answered: That he was an unlearned man, and is not certain that he ever heard the deed read; he was drinking, but not so drunk as not to know what he was doing when he signed the deed; had told complainant frequently that he had no title or claim to the negroes; that they were the separate property of his wife, and that he could not sell them or give them away; complainant still urged him to make the deed, and said that he would fix it with the old lady if she found it out; finally carried respondent from the grocery to Mr. Thomas' office, where the deed was written and signed; complainant gave all the instructions to Mr. Thomas, except as to the names and ages of the negroes, which were stated by respondent, and he only executed the paper at the continued importunity of complainant, who knew that the negroes belonged to respondent's wife; they agreed to keep the deed a secret from respondent's wife, and if she found it out and made a fuss about it, complainant promised to give up the deed to be destroyed. He states the circumstances under which the negro woman was purchased, which correspond with the statement in relation thereto made by Mrs. Oglesby in her answer; states that he consented to the purchase, and that the bill of sale should be executed by Daniel to his wife; that he always considered the negroes as her separate property; that he did not pay a dollar of the purchase money, and all the parties supposed that the bill of sale and the transactions connected therewith secured to her a separate estate in the property.

The answer being filed, counsel for defendants moved to dismiss the order which had been granted taking the negroes out of the possession of the defendants, on the following grounds:

1st. That all the Equity of the bill had been fully sworn off by the answers.

2d. That a Court of Equity will not interfere in behalf of a mere volunteer.

The presiding Judge, after argument, held and decided that the Equity of the bill was not sworn off by the answers, and that the rule as to volunteers did not apply in a case like this, and overruled the motion to dissolve or vacate said order.

To which decision counsel for defendants excepted, assigning said decision as error.

T. R. R. COBB, and HESTER & AKERMAN, for plaintiffs in error.

VANDUZER, *contra*.

By the Court.—LYON, J., delivering the opinion.

The Equity of the bill, if it has any, rests on a paper signed by James Oglesby, without a seal, purporting to give and deliver the negroes in controversy to him, in consideration of love and affection. There never was, in fact, any delivery of the negroes. There was not only no consideration in fact, but that expressed in the deed shows that the deed was without consideration to support it. It is not stated in the bill that the negroes belonged to James Oglesby, or that he had any right to convey them. The answers show that James Oglesby had no title to, or claim upon the negroes at the time he made the paper under which the complainant claims; that the negroes belonged to Mrs. Oglesby, the wife of James, and not to him, and that the complainant knew it at the time he took this paper; that Mrs. Oglesby had bought and paid for the negroes with money from her own earnings by the sale of oaks, &c.; that she took the title to herself, all by the permission of her husband; that she has constantly paid the taxes on them since her purchase in 1849, and all the time claimed and held them as her separate property, and

Oglesby and Wife vs. Hall.

that it was well known to the complainant; that the deed had been wheedled out of James Oglesby, who was an infirm and old man, while in a state of intoxication, by the complainant. These facts are sufficient to vest in Mrs. Oglesby a separate property to the negroes as against her husband and the complainant, who is, at best, but a volunteer, even admitting that the paper was sufficient to convey what title James Oglesby might have had in them. This we do not for an instant admit. On the contrary, we are strongly inclined to the opinion, that the paper, upon its very face, is void for want of a consideration, and we do not put our decision of this case on that ground, because it is not necessary to do so to dispose of it. But the facts show that the title was in Mrs. Oglesby. "If without any ante-nuptial agreement the husband should permit his wife, after marriage, to carry on business on her sole and separate account, all that she earns in trade will be deemed to be her separate property, and disposable of by her as such." *Story's Equity*, §1878. This is pretty respectable authority, and pretty strong on the point, but were it not so, and no other dictum or precedent could be found for it or any strongly against it, we would still so decide. If it be said that the facts set up by the answer are not responsive to the bill, we reply, that they are sufficiently so, we think. The bill ought never to have been sanctioned in the first place. Mrs. Oglesby was no party to the title complainant sets up. What right had he to disturb her possession under the allegations in his bill? Having done so, she had the right to come in and be heard in defense of her title and possession. The Court below should, upon the application of plaintiffs, have dissolved the *ne exeat* and restored the negroes to the possession of Mrs. Oglesby. As he did not, the judgment of the Court below must be reversed on that ground.

OLIVER et al. vs. PERSONS.

1. The defendant in every Equity cause may deny on oath the execution of any document exhibited to the bill, and thus put the complainant on proof.
2. A party having two distinct titles to property may disclaim one and rely entirely on the other, and after such election made, the admissions of his previous in the disclaimed title are not evidence against him.
3. To admit a copy as secondary evidence at Common Law, it is necessary, to show: 1. The genuineness of the original. 2. Its loss or destruction, and 3. That the copy offered is an examined, sworn or true copy.
4. Under our Registry Laws, a copy-deed is not evidence, unless the original appears to have been properly admitted to record.
5. Under the Act of 1856, a *prima facie* presumption in favor of proper probate is raised, where the records have been burnt. But this may be rebutted, and the Judge may hear evidence in rebuttal before admitting the copy as secondary evidence.

In Equity, from Warren Superior Court. Tried before Judge THOMAS, at April Term, 1860.

This was a bill filed by plaintiff in error against defendant for the recovery of sundry slaves. The plaintiff claimed title under a deed of gift made in 1827, by Rachael Persons to Turner Persons, Jr., to a remainder interest in said slaves after the death of said Rachael. Defendant denied, in his answer, the existence of the deed, and filed a plea of "*non est factum*," he claiming title under a subsequent gift from Rachael Persons.

On the trial, complainant moved to strike out the plea of "*non est factum*" filed to the deed of Rachael Persons. The Court refused the motion, and complainant excepted.

The complainant having complied with the 52d Common Law rule, as to the loss of the deed from Rachael Persons to Turner Persons, Jr., offered the following evidence of Mrs. Cynthia Chapman and William Wilder. The former testified that she heard Mrs. Rachael Persons state that she had executed a deed of gift to her son, Turner Persons, in conveying to him the aforesaid property, and that her reason for doing so was to induce him to cease dissipation and live with her; and that at the same time this statement was made, the negroes were on the place where Mrs. Rachael Persons and her son Turner Persons lived, but did not know in whose legal possession they were.

Oliver et al. vs. Persons.


The latter, Wm. Wilder, testified that he knew the negro property in the possession of Rachael Persons, but has seen nothing of the negroes for a great many years; that the last he knew of them they were with Mrs. Rachael Persons at Thomas Persons' house, and also stated the death of the subscribing witnesses to the deed of Rachael Persons. Complainant then offered the following copy-deed:

"GEORGIA, WARREN COUNTY:

"Know all men by these presents, I, Rachael Persons, (widow) of the county aforesaid, for, and in consideration of the sum of five dollars to me in hand, well and truly paid by Turner Persons, the receipt whereof is hereby acknowledged, as well as the good will and affection which I have, and bear for the said Turner Persons, Jr., do give and convey to him, the said Turner Persons, his heirs and assigns, five negroes, to-wit; Miley, a woman, and her four children, Mary, Peter, William and Eliza with her future increase.

"To have and hold forever, provided, I have for myself the possession and service of all said negroes during my life.

"In testimony whereof, I have hereunto set my hand and seal, the 9th day of February, 1827.

her
"RACHAEL  PERSONS.
mark.

"Signed, sealed and delivered in presence of B. Culpepper and William Porter."

"GEORGIA, WARREN COUNTY:

; "I, George W. Dickson, Clerk of the Superior Court of said county, do hereby certify, that the copy-deed above written, was truly and correctly copied by me from the record of the original deed, and that the same is a true and correct copy of, and from said record, which said record was at that time in my office. I do further certify, that said deed was proved by the affidavit of one of the subscribing witnesses thereunto, and which affidavit was duly recorded in my office along with the record of the original deed. I do further certify, that the record of said deed, and of said affidavit, have both been destroyed by fire, and are not now in my office.

"In testimony whereof, I have hereunto set my hand and

Oliver et al. vs. Parsons.

affixed my private seal, there being no seal of office, this October 18th, 1854.

"GEORGE W. DICKSON," [L. S.]

The Court rejected the copy-deed and certificate, and complainant excepted. The complainants' counsel then introduced George W. Dickson as a witness, who testified as follows:

"I got the copy-deed from the book containing the record of deeds in my office. The book has been burned; the Court-house was burned, and I think the book was destroyed; I have never seen it since; the Court-house was burned in April, 1854. I do not know whether any of the books were out of the office, in Mr. Shivers' hands, or not. Mr. Shivers was transferring some of the books at the time of the order of the Inferior Court. I don't know whether he had this book or not; I saw some of the books of Deeds. I don't know that the book which contained this deed was in the office or not; had not seen the book since I copied the deed from it. This paper don't contain the whole that was on the deed; there was something else on it—I don't know what it was; don't know as I ever read the balance. I copied all that Mr. Oliver told me to copy, and gave it to him and he paid for it. The reason I did not copy all, was, that Mr. Oliver said, that it was enough; he wanted to show it to his attorney and recover the property, if he could; I did not give the certificate at the time I gave the copy; I gave the certificate after the record was lost or burned. Judge Cone dictated to me the certificate; he told me he wanted me to make it out, and he wanted me as a witness. At the time I thought it was a probate. Judge Cone asked me about it, and I told him I thought it was a probate. Judge Cone said yes. Daniel Dennis swore to it. I thought it was a probate, but my mind has undergone a change about the paper. I mean by a probate, an affidavit attached to it. I never read it. If I did read it, I don't recollect it; don't know what was in it; if there was any affidavit there I don't know it; don't recollect that there was any name signed to what I called the probate; don't know there was any Justice of the Peace's name to it. Judge Cone told me, Daniel Dennis' name was to it. It must have been from the registry of deeds I took it, though I have no circumstance from which I could

Oliver et al. vs. Persons

say it was from that or from the record of proceedings, or from the minutes. Judge Cone called upon me and asked me if I recollected the facts; don't know that it was when I gave the certificate; can't tell whether it was before or after, that Judge Cone asked me that. The certificate, as I gave it, was my recollection of the facts at the time. I thought it was my duty as an officer of the Court, to give Judge Cone, or any one that applied to me, all the aid in my power, but in truth I did not think much about it. (Interrogations handed to witness.) These are my interrogatories. At the time I thought I was doing right. The answer contained my recollection then of the matters stated in them. I cannot say now that my answer was correct; I won't say now they were incorrect, but it is possible and highly probable there were incorrect. The reason I say so, I don't recollect that I ever read what I have called a probate. Copy is marked Book Q, but I cannot recollect now whether it was the Deed book or other records.

The other records were marked alphabetically as well as the Deed books. I won't say that I copied all the instrument itself; I copied all Mr. Oliver asked me for; I copied right I think as far as I went; I copied this from a record, and as far as it goes it is a correct copy. They were old books that Mr. Shivers was employed to copy, but I can't say whether they were the books before or after 1820; have no recollection that any body had the book that contained the record I copied, or that I delivered it to any body; I was Clerk until 1858. Don't recollect that book was ever in my office after; I looked up the record books about town after the fire and found some, (never found that one,) and have never seen it since; I think the books that Shivers transcribed were returned to my office, the original as well as the copies. I have never seen the book in question among these."

R. M. Wilder sworn, says, I am Clerk of the Superior Court of the county. The books from 1818 or 1820 to 1844 are gone. Letter Q is missing. The other records, besides those of Deeds, are lettered, and I think entered as low as Q, and part I am now recording is W.

Book lettered Q, containing the record of the proceedings of the Court from the Office of the Clerk of the Superior Court, was then offered and admitted as evidence, which showed that the deed from Rachael Persons to Turner Persons, Jr., was not recorded therein.

The counsel for defendant then offered William Gibson and Daniel Dennis as witnesses to be examined alone before the Court and not for the Jury. The introduction of which testimony the plaintiff's counsel objected. The Court overruled the objection and allowed the testimony, to which ruling of the Court the complainants' counsel excepts and assigns as error.

William Gibson introduced, testified that: at the request of Mr. Oliver he examined the Record of Deeds in the Clerk's Office of the Superior Court of Warren county, and found on the record, (that is copied into the Record Book of Deeds,) a paper purporting to be a deed of gift from Rachael Persons, to Turner Persons for certain negroes. The copy of which shown witness, with the certificate of G. W. Dickson, Clerk, he thinks is a true and correct copy of said record. There was on said record what purported to be an affidavit, made according to the recollection of witness by B. Culpepper, and attested by Daniel Dennis as a Justice of the Peace. Cannot recollect all that was in said affidavit; cannot give the language of said affidavit nor its substance, but recollects that neither the execution nor delivery of the deed was stated in the affidavit. Don't remember when the deed purported to be recorded, but is satisfied it was before 1830. The father of witness was the Clerk; the record was not in his hand-writing, or that of his son's, who sometimes wrote for him. It is frequently usual for an entry of the time of recording to be made on the record after every record deed, and signed by the Clerk. Does not recollect that there was any such entry after this instrument on the record.

Mr. Daniel Dennis introduced, testified, that he was elected a Justice of the Peace in 1813, continued in office until about 1842; was out a few years and was elected again, and is acting at this time; lived in the neighborhood of Mrs. Rachael Persons and Thomas Persons in 1827 and 1828, and before and after that time, and knew them well; also Mr. B. Culpepper and William Porter; have no recollection of attesting a deed of gift or any other paper from Mrs. Rachael Persons to Thomas Persons, nor of administering to B. Culpepper an affidavit proving such a deed. In the habit when he attested papers, to know what they mean, and has no recollection of seeing such a deed; is very confident, almost certain, that had he attested or proved such a deed, he would

Olive et al. vs. Persons.

have recollected it. Is now about seventy-six years of age. He does not recollect all nor any of the deeds he attested, or had proved before him in the year 1827, 1829 or 1830.

Complainants' counsel then re-offered in evidence the certified copy of the deed from Rachael Persons to Turner Persons. It, with so much of the certificate of the Clerk as relates to that copy, without that portion which relates to the probate of the paper and the destruction of the record, to which defendant's counsel objected. The Court sustained their objection, and refused to permit the evidence to be submitted to the Jury, to which rulings of the Court, the complainants' counsel excepts, and assigns the same as error.

The counsel for complainant and defendant then agreed that the testimony of George W. Dickson and William Gibson, proving that exhibit D. was a copy of the record, should be considered as before the Jury. Whereupon complainants' counsel offered to read in evidence before the Jury, the copy-deed without the certificate of the Clerk as proof of the contents of the record. To the introduction of which defendant's counsel objected. The Court sustained the objection and refused to allow the evidence offered to go to the Jury. To which ruling the counsel for complainant excepts and assigns as error.

Complainant then offered the evidence of Solomon Wilder, to prove certain admissions of Thomas Persons, Sr., on the ground, that in an answer formerly filed by defendant and afterwards withdrawn, he claimed title under the said Thomas Persons. The Court rejected the evidence, and the complainant excepted.

WARDEN & NELMS, and WM. DOUGHERTY, for plaintiff in error.

A. H. STEPHENS & T. R. R. Cobb, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We shall affirm the judgment of the Court below; and as such is our conclusion, it is unnecessary to elaborate the minor points argued before us, especially as the counsel for plaintiffs in error expressed his indifference as to those points unless there was a reversal on the principal error alleged.

Oliver et al. vs. Persons.

content myself, therefore, with saying, that as to the plea of *non est factum*, a defendant in an Equity cause, clearly has a right to deny the execution of any document annexed as an exhibit to the Bill, and thus put the complainant on proof. The formality of the plea is immaterial.

As to the testimony rejected of the sayings of Thomas Persons, Sr., we think the Court was clearly right. A party having two titles to the same property, certainly has a right to elect, under which he will defend; and when he has disclaimed all benefit of one title, he surely ought not to be burdened with any disability attaching to him as a privy in estate. The Law attaches such disabilities as consequences of his claiming the benefits of the title; when he declines the latter, he relieves himself of the former. Nor do we perceive any inconsistency in the titles set up by defendant in his several answers. They seem to be portions of a series of acts all tending to the same purpose to perfect title in him.

The main question in this case is the admissibility in evidence of the copy-deed of gift. It was offered in various ways by the ingenious and able counsel for plaintiff in error in the Court below, and being rejected as often as offered, many errors are assigned. I shall not notice each separately, but consider the entire question at once. The papers might be admissible: 1st, under the Common Law Rules, or 2d, as a copy from the Registry, or 3d, under the Act 1856-6. Did the case presented to the Court below make it admissible under either?

1. Under the Common Law to admit such secondary evidence, three facts must appear to the Court: 1st. The existence and genuineness of the original. 2d. Its loss or destruction; and 3d. Evidence that the paper offered is either an examined or sworn copy. As to the first requisite, slight evidence is said, by some of the authorities, to be sufficient, and where no issue is made by the pleading as to the existence of the original, this seems to us to be right. When such an issue is made, as in this case, the Court ought to require some more cogent and satisfactory evidence, and such as we do not think appears in the record.

But if there was, this was no examined or sworn copy, but copy of a copy, and hence inadmissible under the Common Law without other proof to annex it to the original.

2. Was it admissible as a copy of a Registered Deed? It

Oliver et al. vs. Persons.

purports to have been attested by two witnesses, neither of them officially. How came it upon the Record? No probate accompanies the copy. Shall the Court presume it probated properly before recorded? In those States where the probate and order for Registry is a judicial or quasi judicial proceeding, such a presumption might be urged upon the Courts, and with plausibility. But can it be done in this State, where the Registry is made without notice to a grantor and by a ministerial officer, who is allowed no discretion in the matter? We think not. A copy from the Registry must show that the same came properly on the Registry. The only evidence offered of that fact here, was the certificate of the Clerk that there was a probate attached to the deed on the record. Two fatal objections show this evidence to be insufficient, viz: 1. That this was a judicial opinion of the Clerk to which he was not competent to testify. 2. That the evidence of the Clerk himself disproves the truth of this certificate.

3. Was the copy admissible under the Act of 1856? That Act prescribes that "where in any counties in this State the public records of the county have been destroyed by fire, any deed or other instrument in writing *that is found to have been recorded*, and the record burnt, such deed or other instrument in writing shall *be taken and held* to have been recorded legally and upon sufficient proof of execution in all the Courts of this State." The 2d section allows the contents of the record to be proved by any person who at any time may have read the record. Two questions arise upon this Statute, 1st. Is this presumption of proper probate *conclusive* or only *prima facie*, and subject to rebuttal? 2d. If traversable, before whom should the issue be heard, the Judge or the Jury? Upon the first point we are, without difficulty, unanimous. The intent of the Legislature was clearly to relieve persons from the effects of such conflagrations by creating a presumption of proper probate in behalf of all their title papers. This was wise and generous legislation. But to go further, and to say to contestants of these titles, you shall be barred from showing the truth by legal evidence, would be unwise and iniquitous legislation, and such as the Court would not lightly attribute to this co-ordinate branch of the Government. Upon the 2d point we have had more difficulty. But a majority of the Court have arrived at a conclusion.

as to the proper construction of this Act, which is conformable to the general principles of Law, and yet seems to offer every benefit which any party could claim under it.

The admission of secondary evidence is a question exclusively for the Court. When once admitted, the other party has no right to introduce evidence to the Jury to show that the Court erred in admitting such evidence. The decision of the Court *quoad hoc* is final. If, then, this presumption is traversable, the rebutting evidence must be heard by the Court before he admits the secondary evidence. What reason is there for receiving evidence which afterwards must be withdrawn on production of further testimony to the Court? If the rebutting evidence was submitted to the Jury, what would be its effect? To call on the Jury to decide a question which by Law is properly for the Court, viz: whether a proper foundation is laid for the reception of secondary evidence? It would be a very anomalous question for the determination of a Jury. Now, if there is much evidence, and conflicting evidence produced to the Court, we think the Judge might, of his own motion, call on a Jury to decide this preliminary issue; or if either party demanded it, we think the Court ought to grant him a Jury to decide this question of fact; otherwise, and in this case, we think the Court did right to hear the evidence on this preliminary question himself.

The decision of the Judge upon the facts proved meets our approval, and consequently, we see no error in his withholding this copy from the Jury under the Act of 1856.

Several questions have been argued before us with zeal, and much research manifested in respect to them, upon which we express no opinion, especially as to the effect of our Registry Laws, in allowing copies of lost deeds to be given in evidence without further proof. There are unquestioned evils connected with the Law practice which has obtained in the State, but we forbear to decide so momentous a point when it is unnecessary to the cause.

Fundy vs. The State of Georgia.

FUNDY vs. THE STATE OF GEORGIA.

1. The opinion of a spectator, expressed just before the commencement of a fight, that one of the parties had a malicious intent towards the other, is not legal evidence that such an intent existed.

Murder, in Gwinnett Superior Court. Tried before Judge HUTCHINS, November, 1859.

The plaintiff in error, John Fundy, was indicted for the murder of Hardin Colson, and pleaded not guilty.

The following is a brief of the evidence introduced on the trial:

Testimony for The State.

John Dunbar was present at the fight; deceased was in the room, together with some others, about to take a drink, and defendant came in and deceased asked defendant to drink with him; defendant made a short reply and refused, and then remarked to witness, he never was so insulted in his life, and witness asked him why? (the parties were about fifteen feet apart, defendant near the counter, and deceased near the door of the partition—they were in the back room) defendant replied, that man asked him to drink with him, and he never was so insulted in his life; deceased remarked, if he was insulted at that to help himself; defendant replied that he could, and turned and advanced toward deceased; defendant at that time run his right hand in his left bosom and cursed deceased; called him a damned puppy; said he had stolen a dollar from him; deceased replied, but witness does not know what; the fight then commenced; they came together, and deceased struck defendant some three or four licks with something; defendant kept advancing toward deceased until the fight commenced; deceased did not go toward defendant up to that time; they clinched and fell on the floor; witness could not tell who was on top or how they were fighting; one or the other hallooed two or three times, but witness could not tell which; some person run up then and parted them; after they were parted, deceased was right out of the room; defendant then came up to the counter.

Fandy vs. The State of Georgia.

ter and handed witness the knife, a bowie-knife about seven inches long, (which is the same now shown,) and told witness to lay it away, as he, defendant, could whip him, deceased, a fair fight; that he, defendant, was not hurt, but he guessed somebody else was, and defendant then went out at the door; witness afterwards saw some blood about midway of the blade of the knife, but did not examine it when it was first handed to him, and it had not been out of his possession until he discovered it; this all occurred on the 8d of October last, in this county; witness saw deceased soon after the fight, and saw but one wound on him; that was on his left side; did not examine for any other; saw Drs. Russell and Freeman there; there were perhaps about one dozen persons in the room when the fight took place—Mr. Bennifield, Allen, two O'Shields, and Mr. Rutledge; these are all now recollected; witness was behind the counter in the same room; as defendant turned from the counter he run his hand in his bosom; cannot say any one besides the parties took any part in the fight; did not see the knife until handed to him; it was then out of the scabbard; does not think deceased a very violent man; never saw deceased have but one fight besides this one.

Cross-examined: Had heard of deceased having some *finesse*; does not know of deceased having the character of a violent man; witness did not come from behind the counter; the persons were stirring about the room, the reason he could not see them any better; did not swear on the first trial that deceased struck him with a stick; when they fell on the floor it was toward the back door some five or six feet from it; the hallooing during the fight by one of the parties, was to take him off; the stick witness found on the floor was about the size of the one shown, perhaps not so large; all the blows witness saw was struck near the partition door, and they scuffled towards where they fell; when deceased was striking he appeared to be striking at defendant's head, and the blows seemed to be heavy; and the stick found was large enough for witness to kill a man with, if he struck him in certain places.

Dr. W. J. Russell testified, he was called upon on the 11th night of October to see deceased, and found him in Ambrose's grocery, and found him on the floor with five wounds, one in the left side between the 8th and 9th ribs,

Fundy vs. The State of Georgia.

two on the arm above the elbow, two on the back, the one on the left side about four inches long and six inches deep, and about two inches directly and through the diaphragm, touching the lungs, the left lobe, as it passed; the wounds on the arm were small; the two on the back, one went to the hollow, and a little wider than the knife shown; thinks they were made with a knife; the one in the side appeared to be cut a little across; attended him; the wounds were inflicted on Monday evening, and he died the Thursday following; is satisfied he died of the wounds; thinks death ensued from the one in his side.

Cross-examined: But one wound, in his opinion, mortal—first went two inches through the ribs, and four inches between the ribs, and then turned down through the diaphragm about four inches; he thinks that the parties were on their feet at the time, but could be done just as well if they were down, and deceased on top of the prisoner; deceased was frequently in difficulties, and a very stout man.

For prosecution: Thinks the wound could be inflicted with the knife shown, and the point is turned as if it had struck something; defendant is not so stout looking as deceased; deceased was a man of great physical power.

Dr. Jesse Lowe saw deceased in Ambrose's grocery on Monday night of the election, and described the wounds nearly as Dr. Russell; deceased lived about four days; thinks the one in the side proved mortal, and the knife shown is long enough to make the wounds; was inclined to believe the wound was given in an inclined position; has no doubt but the wound was the cause of his death.

Cross-examined: Thinks the wound failed to heal, and the loss of blood and the effusion and cutting the diaphragm was, he thinks, the cause of his death; he was removed to Mr. Garret's the next day; the wound or incision in the diaphragm was from four to six inches; cannot account for the wound being wider in the diaphragm; lying down would perhaps have a tendency to increase the rupture; saw deceased that day in a quarrel; cannot say he was a violent man; he was a man of fine physical developments.

For State: It would be almost a miracle for one to recover with such a wound.

Dr. Russell, re-introduced by prosecution: The cut could have been made standing or lying; the wound could be

been made larger in than out; he died from inflammation; he was carried carefully on a cot; he was kept propped up as much as possible.

John O'Shields was present at the difficulty; it was at Sterling's grocery; deceased called out liquor, and asked defendant to have some, and he replied short and refused, and deceased started out and stopped at the door; was in the back room, and had, in going out, got to the middle door and stopped, and deceased took a stick from witness which was about one inch or so thick; about that time defendant told Dunbar that he had never been so insulted in his life, and Dunbar asked why, and he said by as damned a rascal as Colson asking him to drink with him; deceased and defendant was about ten or twelve feet apart; deceased said, in substance, listen at that damned rascal, and oughtn't I to frail him with a stick, and replied to defendant, if he was insulted to help himself, and defendant then approached deceased and said, you are a damned puppy, and have stolen a dollar from me; defendant had his right hand under the left breast of his coat at the time; deceased gave back a step or two against a barrel and raised his stick and said, don't draw a pistol, and defendant advanced to within a step or two of deceased; deceased then struck defendant two or three times with the stick, and defendant backed while deceased was striking until they got near the counter; deceased then dropped the stick and they clinched and tussled and fell on the floor, and witness then saw the knife going a time or two, and deceased got hold of defendant's wrist of the hand in which the knife was held; at that time defendant was on his back on the floor, and deceased was nearly on him, but not quite; deceased had, when witness parted them, his knee on defendant's left arm, and was holding the wrist of his right hand in which was held the knife, and witness slung deceased back, and he, deceased, went out at the door, and witness saw him no more till at W. Ambrose's; thinks the knife shown is about such a knife as defendant had when parted, and when striking with it he was striking deceased rather on the left side and back, most likely on the back; Ambrose's and Sterling's groceries are most joining, and witness saw deceased in Ambrose's grocery sitting holding his side and bleeding very freely; it is in this county; was about 8 o'clock at night, on the first

Fundy vs. The State of Georgia.

Monday in October last; it was about two or three minutes after deceased left, witness found him in Ambrose's grocery; saw but one wound on deceased at the time; that was on the left side, about three or four inches wide; deceased's coat identified; did not see his wounds dressed; deceased died at Garrett's; when deceased backed against the barrel, he rather creaned back; deceased, in the opinion of witness, was not a violent man, but would run against a man pretty strong if he had advantage of him.

Cross-examined: Deceased asked defendant if he would not take something, and defendant refused; at the time defendant made the remark to Dunbar about being so insulted, defendant had his back towards deceased; thinks deceased did not say damn you; does not recollect swearing so on the other trial, but if he did, deceased said so; thinks deceased raised the stick after he stepped back; defendant got near deceased before he stopped, and about that time deceased struck; if witness swore on the first trial that he had stopped before deceased struck him, it was so; some eight or ten feet from where they stopped and clinched to the back door; they fell very quick after clinching; witness was in the door and scared and looking on; defendant had his right hand under the breast of his coat when deceased first struck, and knocked off a lick or two with his left hand; deceased was drinking a little; deceased was a man who would take up a fight very quick, but does not know that he was in the habit of getting up quarrels; thinks deceased was much of a man; heard some one (thinks deceased) say take him off, or par us; thinks there were eight or ten persons in the room when the fight began, and some of them run out; witness and deceased were friendly at the time.

Rebuttal: The chimney is near the counter, and the door is nearer the counter than the chimney.

Simeon O'Shield was present at the fight, and saw it; defendant came into the grocery piazza where witness and deceased were standing, on the side of the house, and stood by the door, and then came towards witness and deceased; deceased and Robert Bennifield was chrowing crack loo, and defendant staggered up against deceased, and witness saw he was the best man in the house; witness stepped out on the ground; defendant acted like a drunken man; defendant then came to witness and asked him to take a drink,

Fuddy vs. The State of Georgia.

caught witness by the arm, and walked up to the bar and called out some liquor; defendant walked as straight as other men; think neither witness nor defendant very drunk at that time; this occurred but a short time before the fight—from five to fifteen minutes; after we went in, witness heard the throwing of crack-oo going on, and heard deceased talking until deceased came in the room; witness left no one out there but deceased and Bennifield; after the staggering, witness and defendant were standing in the door; witness put his foot upon the foot of deceased; deceased looked round, and witness told deceased if he did not mind, he, deceased, and defendant would have a bad difficulty, and deceased replied, he asked defendant no odds, if he would come at him right; this was a minute or two after staggering against them; about the time liquor was set out for defendant, deceased came in and called out a pint of ginger brandy, and deceased and others drank out of the pint cup, and deceased passed it to witness, and he drank; deceased then asked defendant to drink, and defendant refused; deceased asked defendant to drink in about the same manner he did witness and others, which was in a friendly manner; after drinking, deceased and some others started out, met some one at the partition door and stopped; defendant then said to Dunbar, he had not been as badly insulted in six or twelve months; said remark was made in a common voice, and was loud enough for deceased to hear it; deceased then turned around and said, if that had insulted him he could insult him worse; defendant replied, you are a damned puppy, and deceased replied, you are a damned liar; defendant replied, you are the very damned rascal that stole my dollar; defendant was standing leaning with his elbow on the counter, resting his head on his hand, and about that time deceased turned around and took a stick from some one; defendant raised up and turned around, and about that time deceased took hold of the stick; as defendant turned around he put his right hand in his left bosom, and walked up towards deceased, and come in about two or three steps of deceased; deceased stepped back a step or so against a barrel, and said, don't draw a pistol on me, and the next witness saw they were fighting; could not tell which struck first; witness had jumped upon the counter, and it seemed as if both struck about the same time; heard blows, and heard a stick fall, and defendant fell

Fundy vs. The State of Georgia.

near the counter; whether he fell or deceased threw him, does not know; deceased caught him by the wrist of the right hand, in which was the knife, and put his knee upon the same arm, and held him; about that time John O'Shield run up and caught deceased and threw him off, and thinks that defendant struck at deceased with the knife as he was thrown off; that was all the lick he saw after they fell; the knife shown is like the one witness saw defendant have; heard some one halloo, knife; after separated, deceased caught his side and belly and ran out; witness then ran out after the deceased; he next saw defendant a prisoner; nothing to obstruct view of witness from a full view of the fight.

Cross-examination: There was, it appeared, three or four persons, or more, in the room at the time; witness was sober; it was a short or quick fight, perhaps not more than one minute; the parties fell close to the back door; no one between the counter and the parties while fighting, as recollected; saw them all the time, but cannot tell who gave back; the parties were but a very little distance from the middle door when they clinched and scuffled or tussled to where they fell; the parties may have been upon the floor a short time; witness had been in the room with defendant a short time, perhaps five minutes; cannot say the precise words used by deceased when he asked defendant to drink; knows nothing of the character of deceased as a bully; saw deceased striking, but did not see the stick; saw both parties striking; both struck about the same time; witness cannot tell how many drinks he had taken that evening, but thinks he was not disguised with liquor; the reason why witness told deceased to mind, or him and defendant would have a bad difficulty, was, that he had seen them have a difficulty previous; the difficulty was in September last; thinks in that difficulty deceased picked up an old pistol and said he had a great mind to knock him down with it; that difficulty was on account of the parties gambling, and defendant cursed deceased and said he had stole a dollar; witness and his brother prevented deceased from striking defendant with the pistol; heard deceased make no other threat in reference to defendant; was about knocking him down.

Rebuttal: The light appeared dim in the part of the house where the parties were fighting; does not know whether the pistol was capable of shooting or not; thinks the but of the

knife shown is the same defendant had in his bosom at the September fuss.

James Allen saw a portion of the difficulty; deceased struck defendant with his fist, and defendant was using his knife. was the first I saw; they were then on their feet, and near the middle of the counter, not very far from the middle of the floor; defendant appeared to be striking deceased on the left side with a knife; appeared to be a pocket dirk, about five or six inches long in the blade; as deceased was in the act of throwing defendant, he, deceased, said, Boys, see me a fair fight, and defendant struck him and deceased threw defendant on the floor, and then jumped and went out of the room; defendant then got up and handed his knife to John Danbar, and said, By God, if he wanted a fair fight, he could give it to him, and defendant then went out; as they fell, deceased sorter fell over defendant, and then ran off; saw defendant strike some two or three licks; saw deceased strike with nothing but his fist.

Cross-examined: There were several persons in the room; saw deceased strike but one lick, and that was with his fist; there was but one candle, and a dim light at that, as witness recollects; deceased fell rather over defendant; did not hold him down; defendant was not flat on his back on the floor, rather on one hip and elbow, as well as recollected; witness was not drunk, but drinking some; was not in Lawrenceville on the next day, or day thereafter; told Matthew Crawford that he saw deceased strike defendant three licks with a stick; has no recollection of being in Lawrenceville since the difficulty until last Monday.

Nimrod Miller saw a difficulty between deceased and defendant last September Court, one night, in an old house; defendant accused deceased of taking a dollar from him; deceased denied it; defendant said he'd be damned if he didn't, and deceased said he be damned if he did; defendant replied, you are a damned liar; they both rose and deceased commenced pulling off his coat, and defendant run his hand in his side-pocket, and one of the O'Shields caught deceased; and witness caught defendant and carried him out of the room, and witness went back in the room and the door was shut, and deceased reconciled; defendant called witness out and asked him if there was any chance to get to whip that damned rascal, he had stolen a dollar from him, and that he would kill him or have satisfaction for his dollar.

Fundy vs The State of Georgia.

Cross-examined: Did not hear deceased say he would kill defendant if he made that charge again; afterwards, witness told deceased he had better watch defendant, and deceased replied, he did not fear the damned rascal; if he ever made a pass at him he had better make a sure one; did not tell defendant anything about deceased getting into difficulties; he, deceased, was a man that would not take anything from any body; deceased was not a man of difficulty; the pistol in the room was not loaded, and the barrel about two and a-half inches long.

John Gauge, on the night of the 3d October last, met defendant on the street opposite Ambrose's grocery.

Cross-examined: Knew deceased.

Joseph H. Gauge saw defendant on the night of the difficulty.

Cross-examined: Knew deceased.

Martha Williams never heard defendant make any threats about deceased, except, that if he ever pestered him he would whip him.

Cross-examined: Ellen McDaniel lives at the house of Adaline Hunt; lewd women live there.

Ellen McDaniel heard defendant say, on Monday night of last Court, that if ever Hard Colston crossed his path he intended to cut his God damned daylight out, and patted his breast and said he had something in there to do it with.

Cross-examined: Lives at Adaline Hunt's; been there two or three months; lived at A. Liddle's previous to that; the conversation testified to, was in the house, in the early part of the ———; defendant stayed about two hours; Roach came off with defendant when he left; it is about one mile to Hunt's; deceased was there at the time the threat was made, but was not in the house; never heard deceased say anything about defendant.

Hiram J. Cox got the knife shown from John Dunbar; it was bloody and battered.

Cross-examined: Could not consider the house of Adaline Hunt's a whore-house; Ellen McDaniel is considered a perfect prostitute.

P. A. Sterling knew deceased; he was not considered a violent, overbearing man, but would not be run over.

Cross-examined: Does not know of him being an overbearing man; Adaline Hunt's house is considered a brothel; Ellen McDaniel is a prostitute.

Hiram J. Cox, re-introduced: Knew deceased; thinks he was a coward, instead of a violent man.

James D. Spence knew deceased; does not think him a violent man.

Cross-examined: Believed that he would be a dangerous man when aroused; Adaline Hunt's house bore the reputation of a whore-house; Ellen McDaniel has the reputation of a whore.

Zebulon B. Craig has known deceased since 1858; would allow himself trampled upon, but when pushed upon he would defend himself; did not consider him a violent man.

Cross-examined: I have taken no part in this prosecution except in one thing; deceased or any man is worse when drunk than sober.

Asa McMillen arrested defendant on the night of the affray, between Dr. Lewis' Doctor-shop and the blacksmith-shop; he was going towards the shop.

Here the State closed.

Defendant introduced no evidence.

Counsel for defendant objected to the testimony of O. Sheals, "that from five to fifteen minutes before the fight, prisoner staggered up against witness and deceased, who were standing together, and swore that he was the best man in the house," and to the testimony of the same witness, "that immediately after the above occurrence, witness told deceased to be on his guard; if he did not, deceased would have a bad difficulty with prisoner." The objection to this testimony, was upon the grounds, that there was no connection between the occurrence first testified to and the fight, and that the latter was merely the opinion of the witness. The Court overruled the objection, and the testimony went to the Jury, and counsel for defendant excepted.

The evidence being closed, the Court commenced its charge to the Jury, as follows:

"You have been long detained in this investigation, and must be fatigued. I shall, therefore, as briefly as I can, explain the Law to you, and then it will remain for you to render such a verdict as the Law and evidence warrant. Before doing so, let me remind you that in considering the case, you are to let none of the common passions of our nature influence you; no prejudice or partiality should be permitted to enter into your deliberations; as men, we might, on the one hand, weep

Fundy vs. The State of Georgia.

over the sad fate that sent a young man, with his mingled body, to the grave, where it now moulders, and we might, on the other hand, weep over the condition of the prisoner at the bar, and over the sorrows and distresses of a good old man whose gray hairs may be brought with sorrow to the grave, as others have been, by an unfortunate son. But as jurors, you are to indulge in none of these feelings. You have taken an oath to find your verdict according to the evidence, and to that, and nothing else, you ought to look for your guide in making up your verdict."

Counsel for defendant complained of this charge, as calculated to impress too strongly the minds of the Jury against the prisoner, and excepted thereto.

The Court further charged the Jury, that "if they believed that it was prisoner's intention to provoke a difficulty with deceased, to induce him to make an assault upon prisoner, and deceased did make an assault thus provoked by prisoner, with a design to use this as a pretext to inflict his vengeance upon him, and killed him, it was murder; or if prisoner was approaching deceased with a deadly weapon, with intent to kill or wound him, and deceased struck him in self-defense, and used only such force as was necessary for his defense, and the prisoner killed him, in pursuance of his original intention, it is murder."

The Court further charged, that "witness cannot be impeached by proof that she is a prostitute; her want of chastity may and ought to exclude her from good society, but it does not, in Law, impeach her veracity as a witness, or exclude her testimony."

The Court further charged, that "the Law does not impute perjury to any witness, unless he or she is contradicted or impeached, and the Jury must look to the whole evidence. If the witnesses disagree or contradict each other, the Jury are to judge between them and determine according to their opinion as to the truth of the evidence."

To all of which charges the counsel for prisoner excepted.

The Jury returned a verdict of guilty; whereupon, counsel for prisoner moved for a new trial, on the grounds of error in the rulings and charge of the Court above stated and excepted to; and on other grounds, not given, because not necessary to illustrate the decision of the Court.

The Court refused the motion for a new trial on each an

Fandy vs. The State of Georgia.

all the grounds therein taken, and counsel for prisoner excepts, and assigns said refusal as error.

CLARK & LAMAR ; J. N. GLENN ; GORDON, for plaintiff in error.

Solicitor-General THURNAND, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

The whole theory of murder in this case rested upon the fact that the prisoner had an intent to kill the deceased *before* the fight commenced. The opinion of O'Sheals, therefore, that he had such an intent, was very *material* evidence. It tended to hurt the prisoner, because it bore directly upon the point to be established against him. It was not legal evidence, not because such an intention was an improper fact to be proven, but because the mere opinion of a witness, expressed, not on the stand under oath, but reported by him on the stand under oath, as having been expressed just before the fight commenced, was an improper means of proving it. The attempt was made in the argument to bring this evidence within the principle of *res gestæ*, but it cannot be brought within that principle. The opinions which spectators may happen to form concerning an affair, cannot be considered as part and parcel of the affair; and whether they keep their opinions to themselves or express them to others, can make no difference, unless the expression may have influenced the course which the affair took. In such a case, the expression of the opinion would be part and parcel of the affair itself. If, for instance, the deceased in this case had been the slayer instead of the slain, he might have proved that this opinion had been expressed to him just before the fight, by way of showing that he acted on a warning of danger, and not from malice. In that case, the opinion would not be any evidence that the fact had been in accordance with it, but the expression of the opinion would itself be a fact, exerting an influence upon the transaction. But in this case, the opinion went as evidence that the fact had been in accordance with it; that is to say, as evidence that the prisoner did have the intent to kill before the fight commenced. The expression of that opinion to the deceased could have

Fandy vs. The State of Georgia.

had no influence upon the prisoner, and there is no more reason for allowing the witness to testify that he had expressed such an opinion to the deceased, than there would be for allowing him to testify that he had *thought* so, without expressing it. In other words, the expressed opinions of spectators, except when they may be fairly supposed to have exerted an influence upon the affair, are no more part and parcel of it than their secret thoughts would be. We find no other error in this record.

Judgment reversed.

CASES

ARGUED AND DETERMINED IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT
SAVANNAH, JANUARY TERM, 1860.

Present—JOSEPH H. LUMPKIN, }
LINTON STEPHENS, } JUDGES.
RICHARD F. LYON, }

MELL vs. MOONY.

1. Where a plaintiff sues upon one part of a contract consisting of mutual stipulations made at the same time, and relating to the same subject-matter, the defendant may recoup his damages arising from a breach of another part in his favor by the plaintiff; and thus whether the different parts are contained in one instrument or several, and though one part be in writing and the other in parol: *Aliter*, where the contract for the breach, of which damages is claimed by the defendant, is entirely distinct and independent of the one on which the plaintiff sues.
2. Against a proceeding of foreclosure on personal property, the mortgager may at law go into the consideration of the mortgage, or rely by way of defense upon any fact, or principle of Law which would entitle him to relief in a Court of Equity.

Illegality against a proceeding for the foreclosure of a mortgage on personal property. Tried before His Honor Wm. B. FLEMING, in Liberty Superior Court, December Term, 1859.

Mell *v.* Moony.

The decision of the Court embodies the facts of this case.

LAW, BARTOW & LOVELL, NORWOOD, WILSON & LESTER,
for plaintiff in error.

WM. B. GAULDEN, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

Martin D. Moony was a practicing physician in Liberty county, at a place called Taylor's Creek Union Academy. He sold out to John P. Mell for fifteen hundred dollars, five hundred cash, and a thousand in a note, secured by a mortgage on three negroes. Moony gave Mell his obligation that he would not locate with a view of resuming his profession as physician or surgeon within a circle of thirty miles around, and he promised and agreed to pay to Mell one thousand dollars for a violation of his covenant "as liquidated and ascertained damages."

Moony foreclosed his mortgage, and was seeking to enforce it by levy and sale, when Mell interposed, and insisted that Moony had violated the condition of his obligation; that a right had accrued to him to claim the one thousand dollars, and to have it allowed against the claim which Moony was seeking to enforce against him.

His Honor, Judge FLEMING, dismissed Mell's affidavit of illegality upon the following grounds: 1st. Because the consideration for the mortgage or the note, it was given to secure had not failed, because the defendant had received the land and plaintiff's bond for which the one thousand dollar note was given.

2d. Because the damages stipulated in the bond, (the breach of which defendant offered to prove.) were liquidated, and could not, therefore, be recouped in this proceeding; and that unliquidated damages only were the subject of recoupment.

3d. That being liquidated damages, they could only be the subject of set-off; and that they could not be set-off in this proceeding, because the foreclosure of a mortgage being a judgment nothing could be set off against it but a judgment debt.

To all of which Mell, by his counsel, excepted.

We consider the doctrine well settled, that where a plaintiff sues on one part of a contract, consisting of mutual stipulations made at the same time and relating to the same subject-matter, the defendant may recoup his damages arising from the breach of that part which is in his favor; and this, whether the different parts are contained in one instrument or several; and though one part be in writing and the other in parol: *Alister*, where the contract for the breach of which damages are claimed by defendant, is entirely distinct and independent of the one on which the plaintiff sues. *Sedg. on Damages*, top pages 449-452; 4 *Wendell* 498-4, and *ib.* 116; 22 *ib.* 155; 9 *Howard* 225; 11 *ib.* 475; 19 *Ga. Rep.* 505; 3 *Hell (N. Y.) Rep.* 175.

In this last case, where on the sale of a quantity of standing wood, the vendor agreed to indemnify the vendees against any damage that might happen to the wood in consequence of the burning of the adjoining fallow; the vendees giving their note for the price, and afterwards the fallow being burned over, the wood in question was destroyed by the fire, the Court held that in an action by one vender on the note, that the vendees might recoup their damages arising from the loss of the wood.

This doctrine, although spoken of sometime as rather new in the Law, is founded upon the fundamental idea, that the action puts the whole contract in issue as it ought to do, and that no party to it should be allowed to recover of another upon a violation of a part, while his own breach of another part went unredressed. Indeed, it is neither more nor less than the doctrine of failure of consideration. It should meet with favor from the Courts, because it not only subserves the ends of Justice, but saves the expense and delay of double litigation.

But the Judge did not repudiate the plea upon its merits. Indeed, the damages in this case being liquidated, they were pleadable as a set-off. And for that reason, the Court held they could not be recouped. If Mell was entitled to plead the thousand dollars as a set-off for the reason subsequently given: that is this—that the defense by way of set-off was inadmissible as against a judgment of foreclosure, the Judge held, that nothing but a judgment could be set-off against a judgment.

Is the precept to the Clerk to issue an execution for the

Brewton et al. vs. Brewton et al.

amount sworn to by the mortgagee, a judgment? and of such dignity that nothing inferior to a judgment could be pleaded as a set-off against it? Such has not, we believe, been the construction put upon the proceeding of foreclosure. On the contrary, our Courts have invariably held, that the mortgager might go into the consideration of the mortgage, and rely upon any fact or principle of Law which would entitle him to relief, and although the case of Dixon against Cuyler, (27 Ga. Rep. 248,) was upon a foreclosure of real estate, still the general principles announced in that case apply equally to a proceeding to foreclose on personal property. For in this, no previous notice is required, and of course, the proceeding cannot conclude the mortgager. Indeed, it would seem from the terms of the Statute that his right to be heard does not arise until the execution issues. It is conceded that the mortgager could obtain relief in Equity. But why drive him into that forum when the remedy at Law is ample, and when the statutory proceeding to foreclose mortgages was substituted for that in Chancery? Ought not the same defences to be allowed at Law that could before have been set up in Equity?

BREWTON *et al.* vs. BREWTON *et al.*

1. The doctrine of bringing advancements into *hatch-pot*, has no application when there is a *will* which does not require it to be done.

In Equity, in Bulloch Superior Court. Decision on demurrer by Judge FLEMING, March Term, 1860.

This was a bill in Equity filed by Nathan Brewton and Benjamin Brewton, administrators with the Will annexed of Nathan Brewton, deceased, against the heirs and legatees of deceased, for an account and settlement of the estate of com-

Brewster et al. vs. Brewster et al.

plainants testator, and calling upon defendants, children of testator, and his sons-in-law, to account for and bring into *hotch-pot* the property and estate, and money which had been loaned and advanced to them by testator in his life-time.

To this bill defendants demurred, on the ground that the deceased having died testate, they are not bound, and cannot be compelled to account for, and bring into *hotch-pot* the advancements or gifts made to them by testator; that the doctrine of advancements and *hotch-pot* applies only in cases of intestacy.

The presiding Judge sustained the demurrer, and ordered the bill to be dismissed as to so much thereof as seeks an account for property or money advanced by testator to defendants. To which decision counsel for complainants except.

E. H. BACON, for plaintiff in error.

JNO. M. MILLEN, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

This case turns really upon the proper construction of the complainants' bill. The Judge, who sustained the demurrer to it, thought it claimed that *gifts* made by the testator to his children in his life-time should be brought into *hotch-pot*, while counsel for the bill contend that it only asks that *loans* may be brought in. The bill was not wholly dismissed, (being retained for other purposes,) and if the complainants are really after loans and not gifts, it will be easy to make their bill sufficiently explicit by amendment. But as to bringing gifts into *hotch-pot*, we concur with His Honor below, that it cannot be required when there is a *Will* which does not require it. The Law in relation to advancements has no application when there is a *Will*. The *Will* itself is then the Law of distribution, and *all that the testator leaves at his death* must go according to the *Will*.

Judgment affirmed.

Hook vs. Stovall, Dunn & Co.

HOOK vs. STOVALL, DUNN & CO.

1. In a suit for the price of a negro sold and warranted to be sound, if the proof shows that there was unsoundness at the time of the sale, the verdict must make some deduction from the agreed price, whether the negro is the unsound state was worth more than the agreed price or not.
2. The proper measure of damage in such a case, is the difference between the value of the property, if sound, as it was warranted to be, and its value unsound, as it actually was at the time of the sale—the agreed price being taken as the standard of sound value, and the unsound value being proportioned to it.
3. A witness cannot express his opinion upon facts stated by another witness, unless he is an expert.

Complaint, in Jefferson Superior Court. Decision by Judge HOLT, at April Term, 1860.

This was an action upon a promissory note in the short form. The defense relied upon was a partial failure of consideration, in this: that the note sued on was given for a negro girl slave named Mary, warranted sound by defendants in error to plaintiff in error, when said slave was unsound at the time of sale. The question of fact was submitted by the Court to the Jury, who rendered a verdict for the plaintiff in the Court below, for the full amount of the note, with damages for a frivolous appeal. The defendant moved the Court for a new trial on ten grounds, the first five of which are, substantially, that the verdict was contrary to the Law and the evidence. The other grounds are as follows:

6th. Because the Court refused, while plaintiff's attorney was arguing the case to the Jury, to stop him, upon objection of defendant, from stating to the Jury, that they offered to prove a tender by plaintiff, after the sale of the negro to defendant, of the consideration back to defendant, and an offer to take back the negro, and adding thereto words asserting the truth of said facts.

7th. Because the Court erred in charging the Jury, that the difference between the slave's value, sound, without reference to the price to be paid for her, and her value, diseased as she was, being ascertained, that difference was the damage to which the defendant was entitled, and should be deducted from the amount of the note at the time it was given. If th

Jury find a breach of covenant, they must look to the whole evidence, and from that come to the best conclusion they can as to the damage resulting to the injured party therefrom, and, be it much or little, allow it to him.

8th. Because the Court refused to charge the Jury, when requested in writing by defendant, "that before the Jury could find the full amount of the note sued upon to be due, they must first find that the eye was not diseased at the time of the warranty."

9th. Because the Court refused to allow said defendant to ask his witness, William A. Stokes, "if the negro girl was, in March, 1852, (the time of the trade,) worth \$680, sound, what would she be worth at that time, unsound in her eye, as testified by Dr. R. R. Dickson?"

10th. Because the Court refused to allow said defendant to ask said witness, Stokes, "what was the difference between the value of said girl with her eye sound and with it unsound, as testified to by Dr. R. R. Dickson?"

The motion for a new trial was refused by the Judge of the Court below, and, in his decision thereupon, he says that the sixth ground of motion is not true in fact; that, as to the seventh ground, he charged the Jury in the language of the Supreme Court in this case; that, as to the eighth ground, the request to charge differed but little from the charge which had been given, and that, as far as it conformed, it was not necessary to be repeated; and, as far as it differed, was improper; that, as to the ninth and tenth grounds, the witness, Stokes, was not examined as an expert, and his opinion was asked upon facts testified to by another witness. As to the first five grounds, the Judge of the Court below says that the verdict sought to be set aside is the third concurring verdict of special Juries, deciding facts almost identical, and expresses his satisfaction with the same.

To the decision of the Court below, refusing the motion for a new trial, counsel for defendant below excepted, and assign error thereupon.

JOHN T. SHEWMAKE, for plaintiff in error.

EDWARD H. POTTLE, for defendants in error.

 Hook vs. Stovall, Dunn & Co.

By the Court.—STEPHENS, J., delivering the opinion.

The Judge refused to charge as requested, that before the Jury could find the full amount of the note, they must first find that the negro was not diseased at the time of the warranty. Upon a former trial of this same case, (see 26 Ga. Rep., 709,) this identical charge was refused by the presiding Judge, and adjudged by this Court to have been a proper charge. The refusal to give it was distinctly adjudged to have been *error*; why it should have been refused again, I cannot understand. All that we can do in the present position of the case is, to adjudge again as we do adjudge, that the refusal was error. The proposition is sound Law, and it is applicable to the case. There are also two other points which need elucidation for use in the new trial.

2. The measure of damages laid down by the Judge in this case, while it is a literal extract from the opinion of Judge McDONALD on the former trial of this same case, is but a part, which, separate from its context, leads to a conclusion directly opposed to the fair conclusion which is to be drawn from the whole opinion. This isolated part is inaccurate, and the inaccuracy is easily detected by its departure from the general reasoning of the opinion. That general reasoning is strong and clear, and rests upon the foundation that the agreed price of the negro is the guiding-star in estimating the damage caused by her unsoundness. In the extract, Judge McDONALD does say that the damage is the difference between the value of the negro, if sound, and her value unsound, "without reference to the price to be paid for her;" but I cannot resist the conviction, "without" was written for *with*, by a slip of the pen, or from a momentary vibration of the idea. Read, "*with* reference, for, "*without* reference," and the whole opinion becomes consistent with itself and with the previous rulings of this Court upon the same subject. This accident seems to have created some difficulty with members of the Bar, as well as with the Judge who presided on the trial below. I will endeavor to place the rule where there can be no misapprehension concerning it for the future. The damage is to be recovered or deducted (for there is no difference whether the damaged party sues or is sued) is the difference between the value of the property, if sound as it was warranted to be, and its value, unsound, as it actually was.

the time of the warranty, *the agreed price being taken as the standard of the sound value.*

There is no difficulty in the practical application of this rule; for though no witness perhaps would fix the same price which the parties may have fixed, yet each witness may fix his own price upon the sound article and upon the unsound, and the difference will show the *per centum* of loss on the sound value fixed by him. *The same per centum* taken off of the *purchase money* will give the true damage. An intelligent witness could shorten the process by stating at once the ratio or *per centum* of damage caused by the unsoundness, as that the disease had lessened the value one-half, one-fifth, or one-hundredth. In other words, it is a *proportional* part of value to be taken off, and not an absolute quantity. Any other rule is inconsistent with the doctrine uniformly held by this Court, that where the unsoundness renders the property totally worthless, the measure of damages is the purchase money. An instance will illustrate the inconsistency: Suppose a man pays \$800 for a negro actually worth \$1,000, (no improbable supposition,) taking a warranty of soundness; the negro turns out to have been diseased, and the witnesses state that the negro, sound, would be worth \$1,000, but unsound, is worth only \$100: on the rule as laid down by the Judge in this case, the recovery would be \$900; that is, the plaintiff would get back \$100 more than his purchase money, and have a negro worth \$100 besides. But if the negro were *totally worthless*, he would get back only his purchase money; in other words, a partial failure of consideration would entitle him to a larger recovery than a total failure would. This is absurd. The true rule would take off nine-tenths of the purchase money, and never would exceed the purchase money in any case, nor equal it, unless the negro should be totally worthless. Where the damage is to be deducted, as it is to be when the damaged party is sued, the deduction should be made at the time when the purchase money was due; and when it is to be recovered by a plaintiff, he having paid the purchase money, it assumes the form of an excessive payment, and I think he ought to recover the amount of the excess with interest from the time it was paid. The case before us is one of deduction, involving no question of interest in form, though in substance it does; and what I

Hook w. Stovall, Dunn & Co.

say, therefore, in relation to interest upon a recovery of damages is extra-judicial. The verdict ought not, perhaps, to find interest as such, but the damages found ought to cover the interest. All this applies only to such damage as results from a failure of consideration, total or partial; extraordinary damage, such as physicians' bills and other expenses of sickness, is to be estimated by the fair cost of such things.

8. We think the proposed evidence of Stokes was properly rejected. He was asked as to the deterioration of value produced by an unsoundness of which he knew nothing except as it had been stated on the witness' stand by Dr. Dickson. He could give no opinion except upon facts within his own knowledge, unless he was an *expert*. Mr. Stokes probably was an expert in valuing sound negroes, but he had no peculiar skill, I imagine, in estimating the effects of disease. There can be no difficulty, however, in getting at the desired fact. The doctor himself, whether he be a skillful judge of the value of negroes or not, is the best judge of the effects of the disease—how much it detracts from the physical energies and usefulness, as well as from the chances of life, and so in what *proportion* it lessens the usefulness or value of the negro. I will only add, that, in my opinion, this is not a case where previous concurrent verdicts ought to have weighed against a new trial. The unsoundness at the time of the sale was proven abundantly and beyond all doubt, (and so this Court has said when the case was on a former hearing,) and the Law, therefore, demanded that there should be some abatement from the price. The Jury, in refusing to allow it, after proper instructions, would but be setting the Law aside. The repetitions of wrong can form no ground for acquiescence in it.

Judgment reversed.

HOBBS vs. DAVIS.

1. Where there is a conflict of testimony as to the terms of a contract, and the witnesses are equally credible, neither being present when the contract proven by the other was made, it may be reconciled by supposing that in the course of the negotiation the terms were changed; and in that event, the last should be enforced.
2. When a negro is hired to make a crop, and taken away by the owner in the middle of the year, whereby the crop is entirely lost, the true measure of damages is the hire of the negro, the rent of the land and the expenses incurred for the purpose of making the crop.
3. When a negro is hired to make a crop of corn, cotton, &c., and no time is fixed for the termination of the hiring, it will be presumed to be for the year.

Case, in Bryan Superior Court. Tried before Judge FLEMING, December Term, 1858.

The facts are embodied in the opinion of the Court.

WM. B. GAULDEN, for plaintiff in error.

A. B. SMITH, for defendant.

By the Court—LUMPKIN, J., delivering the opinion.

This was an action brought in Bryan Superior Court, by Sarah Davis, against John Hobbs, to recover damages of the defendant for, and on account of his having withdrawn from the possession of the plaintiff, in the month of May, 1858, a negro woman which he had hired to her at the beginning of that year, to make a crop that year. The Jury assessed the plaintiff's damages at one hundred and twenty-five dollars, with costs.

No motion having been made for a new trial, of course there can be no exception upon which error can be assigned in this Court, that the verdict was contrary to the evidence. The only errors that can be legitimately assigned, are upon the charges of the Court.

In order to understand the points raised and decided in this case, it is indispensably necessary to state the testimony. Josiah Davis, the brother of the plaintiff, testified, that the

Hobbs vs. Davis.

contract for the hire of the negro woman, Edy, was made in his presence and at his store, in the fore part of the year, 1858, and it was this: The plaintiff was to pay the defendant eight dollars per month. She was to take her one month at that price, on trial, and if she was satisfied with the woman and the woman with her, she was then to keep her at that price. The defendant told plaintiff that if, at any time, she should become dissatisfied with the woman, she could return her and pay for the time she had had her. Witness saw no money paid, but had every reason for believing it was paid. There was no set time how long plaintiff was to keep the negro woman. The negro woman was hired for the purpose of making a crop that year. The defendant took the negro away against the consent of the plaintiff, and for no cause that witness knew of. Plaintiff lost her crop on account of the woman's being taken away; and witness believes that if it had been well tended, that it would have been worth one hundred and fifty dollars. There was no one present when the contract was made except plaintiff and defendant, witness and wife.

Mrs. Hobbs, a daughter-in-law of the defendant, swore, that she was present when the contract was made. The plaintiff was to have Edy for one month, at eight dollars, and any time after that, that defendant might want said negro woman, she was to come home. This was distinctly agreed upon by the parties. The contract was made at the dwelling-house of Josiah Davis, in Bulloch county; and there was no one present at the time but witness, plaintiff and defendant.

The testimony being closed, the Court, after argument, charged the Jury, that the testimony being conflicting, it was their duty to reconcile it, if possible; that the only way this could be done, was by supposing there were two contracts, and it was for the Jury to ascertain from the evidence which was made last.

As to the measure of damages for the breach of the contract, the Court charged the Jury, that the measure of damages was not simply what such a negro would hire for, for the purpose of profit, and that a negro taken from the crop in May or June, the grassy season of the year, is more valuable than the average value of the negro for the whole year. This charge was in response to a request from defendant

Hobbs vs. Davis

counsel, that if they found a breach of the contract, the measure of the damages would be what such a negro would hire for per annum.

The Court further charged the Jury, that when a negro is hired for farming purposes, and no time is set for the termination of the contract for hire, that the Law implies a hiring for the year.

1. There being an irreconcilable conflict in the testimony, upon the supposition that the witnesses are equally credible, as to the terms of the contract, the violation of which is the subject-matter of this suit, as well as to the persons present when it was made, we think the Court perhaps suggested the only mode of escaping from the dilemma, to-wit: by supposing that the two witnesses, Josiah Davis and Mrs. Hobbs, testified to different transactions, which might have occurred the same day—the one at the house and the other at the store; and that, in that event, the last must prevail.

2. The Court was clearly right in refusing to recognize the rule requested to be given in charge by defendant's counsel, as the proper criterion for the assessment of damages in this case, namely: the average value of such a negro by way of hire for the year. The plaintiff's crop was lost by the wrongful act of the defendant. Had the defendant shown—and it was incumbent upon him to make this proof—that the plaintiff could, in the exercise of ordinary diligence, have substituted another servant, and thus have prevented the loss of her crop, it might have gone in mitigation of damages.

As it was, the true criterion of damages was, perhaps, the hire of the negro, the rent of the land and all the expense incurred, and actual loss sustained by the misconduct of the defendant, rather than the conjecture of the witness, as to what the crop would have been worth. But inasmuch as the Jury found less, by twenty-five dollars, than the amount sworn to by Josiah Davis and only about that sum more than the price agreed to be paid for the woman, and no motion was made for a new trial on account of the verdict, we do not deem it best to procrastinate the litigation by sending the case back.

3. It is complained that the Court erred in charging the Jury, that where no time is fixed, that the Law presumes that where a slave is hired for plantation purposes, it is hired for the year.

Johnson alias Thompson vs. The State of Georgia.

If we hire a negro mechanic to build a house or a chimney, he is hired for the time necessary to complete the job; and so of every other contract of hiring. Reference is had to the object for which the negro is hired; and is it not the universal practice in a cotton country to hire negroes for the year, if hired at the beginning of the year? and did not this presumption arise and apply in this case? The woman was hired at the beginning of the year, and, as the witness testifies, to make a crop of corn, cotton, potatoes, &c., the presumption is, that she was hired for the year 1858.

Let the judgment be affirmed.

JOHNSON *alias* THOMPSON *vs.* THE STATE OF GEORGIA.

1. A Policeman or Watchman under city ordinances, is as much under the protection of the Law in making an arrest as any public officer, such as Sheriff, Bailiff or Constable.
2. An officer is not necessarily a trespasser in making an arrest on probable ground of suspicion and without a warrant.
3. Although the arrest of one accused or suspected, should be illegal or a search of his property or person by the officer should be unauthorized, this would not justify the accused in shooting the officer, not to prevent such arrest or search, but after the arrest had been made and the search voluntarily submitted to or tendered.
4. It is not error in the Court to state a principle or fact to the Jury in his charge which is wholly immaterial and which does not affect, in any way, any defense of the accused.
5. It is not error in the Court to state a fact, as a fact, to the Jury, which is admitted by counsel in defense, and on which there is no issue.
6. When the defense relied on for shooting at an officer is, that the arrest was illegal and unauthorized, any fact, circumstances or information on which the officer acted in making the arrest, is admissible, not as proof of the facts, but as evidence that the officer, in making the arrest, did so on reasonable ground of suspicion.

7. When the evidence is sufficient to support the finding, and the verdict is not against Law, or the charge of the Court, and there is no error in the rulings of the Court, a new trial will not be granted.

Indictment, in Richmond Superior Court. Decision by Judge HOLT, at January Term, 1860.

The indictment in this case contains four counts, two of which charge the defendant with the offense of "assaulting with intent to murder," and the other two, with the offense of "shooting at another."

The facts of the case are, in substance, that Joseph B. Ramsey, a police officer of Augusta, having arrested one Stone upon the charge of attempting to pick the pocket of Mr. Theodore Cone, at the circus, and took him to the City Hall and left him there in charge of the police, went to the Burke House in search of defendant, and to search the room of Stone. Ramsey saw, on the register kept there, the name of Mr. Stone and Mr. Thompson, and got permission from the keeper of the house to go into Stone's room, No. 9, to search his baggage, which he did, accompanied by Mr. Bell, the keeper, with a light. While he was searching, the defendant came in and asked Ramsey why he was in his room searching clothes? saying he was no robber; said it was his room; that he slept there with Mr. Stone. Ramsey, looking at him, told him he suited the description he had of him, and arrested him as an accomplice of Stone, at the same time telling him he was a police officer, and showing his badge. When arrested, defendant refused to be searched; denied the room to be his; handed to Ramsey the key of his carpet-bag, and said if he would go to No. 14 he might search his carpet-bag. On their way thither, defendant threatened Ramsey's life—attempted resistance, but not succeeding, the party—Bell, the defendant and Ramsey—entered the room No. 14. The defendant took up his carpet-bag and laid it before Ramsey on a bed. Ramsey then put down a gun in the form of a walking-cane, which he had taken from Stone when he arrested him, and proceeded with the search, which he had nearly completed, when he heard a click; he looked around and saw defendant raise the gun and aim at him, and as he (Ramsey) wheeled, the defendant fired, inflicting upon Ramsey a severe and dangerous wound. Being subdued and

Johnson alias Thompson vs. The State of Georgia.

placed in the hands of another officer, defendant was taken to jail, and in his pocket was found the sight of the gun with which he had shot Ramsey. He then said his name was John Johnson. He had registered his name at the Burk House as Charles Thompson.

In the progress of the trial, defendant's counsel objected to so much of Ramsey's testimony as was contained in the language: "I got the stick from Mr. Stone, who said that it belonged to defendant; that I should be careful with it, it was loaded. He further stated in conversation that defendant stopped at Mr. Bell's." Also, to so much of Ramsey's testimony as was contained in this language: "I went into Mr. Bell's house and looked on the register, and found Mr. Stone's and Mr. Thompson's names and two others on the book." These objections were overruled by the Court.

The Court was requested in writing by defendant's counsel to charge the Jury as follows:

1st. That Joseph B. Ramsey, in his capacity of a police officer, had no right or authority to arrest the defendant without a warrant.

2d. That if the Jury find, from the evidence, that Joseph B. Ramsey had no warrant to search the room and baggage of the defendant, he (Ramsey) was a trespasser.

3d. That if the Jury find, from the evidence, that the arrest or capture of the defendant by Ramsey was without the authority of Law, the defendant had a right, under the Law, to resist the arrest, and also had a right to resist the searching of his room and baggage.

The Court refused to give in charge the first request, stating to the Jury that the Legislature of the State had clothed the City Council of Augusta with power to regulate the police department of the city, and that the officer was not compelled to wait until he could get a warrant, but had a right to make the arrest and detain the party until a warrant could be procured.

The Court gave the second request in charge, but added thereto the remark, that the defendant had no right to shoot Ramsey.

The Court refused to give the third request, adding to such refusal the remark, that the defendant had no right to resist the arrest; that Ramsey was guilty of false imprisonment and that the defendant should wait and take the remedy the Law gave him for the same.

Johnson alias Thompson vs. The State of Georgia.

The defendant's counsel also requested the Court to read to the Jury the fourth article of the amendments to the Constitution of the United States. This the Court refused to do, remarking, that the same had been read to the Jury by the counsel; that it did not apply to the case; that Ramsey, in making the arrest, did not violate this provision of the Constitution.

The Court also charged the Jury, that nothing but necessary self-defense was an excuse under the Law for shooting at another. And in his charge to the Jury, the Court stated that the shooting was not disputed, but was admitted by counsel.

A verdict of guilty having been rendered, counsel for defendant moved the Court for a new trial, setting forth all the rulings and decisions aforesaid, the charges as given and the refusals to charge as requested, as grounds for the motion; also, because the verdict was contrary to Law and evidence. The Court below refused the motion for a new trial, and this decision is excepted to, and error assigned upon all the grounds taken in the motion.

E. J. WALKER and **W. R. McLAWS**, for plaintiff in error.

Attorney General ROGERS, for defendant in error.

By the Court.—**LYON, J.**, delivering the opinion.

The Court refused to charge, that Joseph B. Ramsey, in his capacity as a police officer, had no right or authority to arrest the defendant without a warrant, but charged, that the Legislature had clothed the City Council of Augusta with power to regulate the police department of the city, and that the officer was not compelled to wait until he could get a warrant, but had a right to make the arrest and detain the party until a warrant could be procured; that if the Jury find, from the evidence, that Joseph B. Ramsey had no warrant to search the room and baggage of the defendant, he (Ramsey) was a trespasser, but defendant had no right to shoot him. The Court refused to charge, that if the Jury found, from the evidence, that the arrest, or capture of the defendant, by Ramsey, was without the authority of Law, the defendant had a right, under the Law, to resist the arrest,

Johnson alias Thompson vs. The State of Georgia.

and also had a right to resist the searching of his room and baggage. The Court charged, that the defendant had no right to resist the arrest; that Ramsey was guilty of false imprisonment, and that defendant should wait and take his remedy the Law gave him for the same; that nothing but self-defense was an excuse for shooting at another.

These charges and refusals to charge are excepted to, and form the first four grounds of the motion for new trial. The substance of the four several exceptions is, that the arrest, by Ramsey, as a police officer and without a warrant, was illegal, and that, consequently, the defendant had the right to resist the arrest and search of his baggage and room, and in this sense we will consider the whole together with reference to the facts of the case.

1. It is not true, that, because the officer arresting was a police officer of the city of Augusta, and not an officer of the public Law of the land, as a Sheriff or Constable, the arrest was illegal, or that the prisoner had any other right to resist him than a public officer, for the public officer or watchman of a city is as much under the protection of the Law as a bailiff, constable or sheriff. 1 *Russ. on Cr.*, 532 and 533.

2. Neither is it true, that the officer is necessarily a trespasser, or his arrest illegal, because he acts without a warrant. On the contrary, he is, "by virtue of his office, empowered, by Law, to arrest felons, or those that are suspected of felony, and that before conviction and also before indictment. And these are under a greater protection of the Law, in execution of this part of their office, upon these two accounts:

"1. Because they are persons more eminently trusted by the Law, as in many other incidents to their office, so in this.

"2. Because they are, by Law, punishable, if they neglect their duty in it.

"And therefore it is all the reason that can be, that they should have the greatest protection and encouragement in the due execution of their office, since their actions herein are not arbitrary, but necessary duties, (not permissions,) and under severe punishment in their neglect thereof. And hence it is that these officers, that are thus entrusted, may, without any other warrant but from themselves, arrest felons and those that are probably suspected of felonies, and if they be assaulted and killed in the execution of their office

it is murder." 2 *Hall's Pleas of the Crown*, 85, 86; and 1 *East P. C.*, 801. So, upon authority, the Court committed no error.

3. But there is another view of this question which effectually disposes of it; that is, concede that the Law is as claimed by defendant—that the arrest was illegal, and the defendant had a right, under the Law, and it was his constitutional privilege, to resist an illegal seizure of his person or search of his room and baggage: according to the proof, the shooting was not in resistance to the arrest or the search, nor to prevent either. On the contrary, the shooting took place after he was arrested, and after he had voluntarily carried the officer to the room where his carpet-bag was, and submitted it to the inspection of the officer, apparently to relieve himself from the suspicion of being a robber or felon, and while the officer was thus thrown off his guard, engaged in the examination of the carpet-bag, and had nearly finished, the defendant, who was unwatched, and behind the officer, attempted to, and did shoot, inflicting a dangerous wound. Had he, in fact, resisted the effort to arrest or search, and done the shooting while in the act of resistance, and the Law was as claimed, there would be error; otherwise, there is none.

4. There was no error in the charge, "that nothing but necessary self-defense was an excuse, under the Law, for shooting at another, nor in the failure of the Court to read to the Jury, on the request of counsel, the fourth section of the Constitution of the United States, in remarking that it did not apply to the case; that Ramsey, in making the arrest, did not violate that provision," for the reason that nothing else was relied on by the defense as an excuse for the shooting, and that whether Ramsey, in the arrest, was in violation of that article of the Constitution or not, still, under the facts of the case, the defendant was not justifiable in shooting Ramsey. Hence, upon the merits, the charge was wholly immaterial.

5. The Court stated to the Jury, that the shooting was not disputed, but admitted. As this statement was true, and there was no issue upon it, there was no error in the statement.

6. The evidence objected to, to-wit: "I got the stick from Mr. Stone, who said it belonged to the defendant; that I

Johnson alias Thompson vs. The State of Georgia.

should be careful with it, that it was loaded, and that the defendant stopped at Mr. Bell's;" further, "I went into Mr. Bell's house and looked on the register and found Mr. Stone's and Mr. Thompson's names and two others on the books," were not offered as evidence of the guilt of the accused, but as circumstances which influenced Ramsey to suspect accused of being an accomplice of Stone, who was charged with a felony, and induced him to make the arrest. For this purpose, we think the evidence was admissible, as would any other facts or information, on which the officer acted, that would tend to show that his suspicions were not without reasonable grounds.

7. We think the evidence was sufficient to support the verdict, and that the finding was not against Law or the charge of the Court, and as there was no error in the rulings of the Court by which the defense of the prisoner was affected, the new trial is refused.

Judgment affirmed.

RYAN vs. LIEBER et al.

1. Why is not a transfer of an execution by plaintiff's attorney good as an equitable assignment, the plaintiff having received the money paid on the assignment?
2. A levy of personal property which has been dismissed by plaintiff or plaintiff's attorney, without being productive, and when no injury has resulted from such dismissal, sufficiently accounts for, and explains such levy to authorize plaintiff to proceed with its collection, and to enable it to participate in the distribution of a fund in Court raised from the sale of the defendant's property according to its priority.

Certiorari, in Chatham Superior Court. Tried before Judge FLEMING, and decided at vacation, on 14th August, 1859.

Mr. Justice LYON sufficiently states the facts of this case in his opinion.

E. H. BACON, for plaintiff in error.

HARDEN & GUERRARD, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

The facts in this case briefly are: On the 5th day of May, 1859, O'Connor & Cullender obtained a judgment against William R. Vallum in the Sixth Circuit Court of the United States for the Southern District of Georgia. On the 7th day of July of the same year, Isaac Lieber obtained a judgment in the same Court against the same defendant, and at the November Term of the City Court of Savannah, Alfred Haywood obtained judgment against the same defendant. From all of said judgments, executions issued. The *fi. fa.* that issued from the judgment in favor of O'Connor & Cullender, was levied on "Four billiard tables, balls, cues, maces," &c., attached to the same on 5th June, 1859. On 31st August following, plaintiffs, by their attorneys, transferred this execution to John Ryan, who dismissed the levy. The transfer is as follows:

"For and in consideration of the sum of four hundred

Ryan vs. Lieber et al.

and ninety-two dollars and fifty-nine cents, to us in hand paid, by John Ryan, we hereby transfer the within *fi. fa.* to him, (said sum above named being the balance due on said *fi. fa.*,) and also the judgment on which said execution issued, to be collected at his own costs and charges, without recourse on the plaintiff or us.

(Signed)

"O'CONNOR & CULLENDER,

"By our attorneys, BACON & LEVY."

The *fi. fa.* in favor of Alfred Haywood was subsequently levied on "Four billiard tables, balls, cues, maces, &c., attached to the same." Under this last levy, the property was sold and the money arising from the sale brought into the City Court for distribution, and was claimed by all the above stated executions. On a motion to distribute, junior judgment creditors to that so controlled by Ryan, moved its exclusion from a participation in this fund on three grounds:

1st. That a levy upon personal property and the dismissal thereof by the assignee amounts to a satisfaction, so far as third persons are concerned.

2d. That the assignment of the execution was void, an attorney of record not being able to execute the same without express power from the client.

3d. That the amount due on the executions appearing to be paid, it is *functus officio*.

The City Court excluded the execution, and ordered the money paid over to a junior execution, holding that the assignment was void; that the levy was dismissed, consequently, by one having no authority to do so, and was still unaccounted for, and being unexplained, was *prima facie* satisfied, but that, conceding the assignment to be good, still, as the levy had been unproductive by the fault of the assignee, the lien as to the prior judgments was extinguished. The case having been carried to the Superior Court on certiorari, that Court reversed the judgment of the City Court, on the objection to the assignment, holding that, under the peculiar facts of the case, the assignee was not excluded, on the ground that the transfer was made by the plaintiff's attorneys, but affirmed the judgment as to the effect of the levy and its subsequent dismissal. To that decision plaintiffs except. That is the only question properly before us, and there is no exception to the decision upon the sufficiency

the assignment; hence, we do not decide that question, but, as it has been argued and considered to some extent, we do not hesitate to give it, as the present impression of the Court, that if the assignment is not good, as a legal transfer, so as to vest the legal title in the assignee, that it is sufficient to convey to the assignee such an equitable interest in the *fi. fa.* and judgment as will enable the assignee to use the same in the name of the plaintiff for its collection. Why not? The assignee has advanced the money to the plaintiff, through their attorneys, on the faith of their agreement, for the plaintiffs, that he shall have the use of the execution and judgment for his reimbursement. The plaintiffs have received the money and got the full benefit of it. The fair presumption is, that they have ratified the act of their attorney, and if they have not, they must return the money, placing the assignee where they found him; and until they do this, ought the assignee not to have the benefit of that part of the contract, which is in his favor? But, as I have stated, we do not regard this as a settlement of the question, but as an expression of opinion merely, which is open to review.

Then, as to the other question, both the City and Superior Courts base their judgments on decisions of this Court, which they say have settled the question, that a levy on personal property and a dismissal of that levy by the plaintiff displaces the lien of such execution as to junior judgment creditors. We deny that this Court has so decided, and I proceed at once to the consideration of those cases in which it is claimed that the Court so decided. The first case is that of *Curan vs. Colbert*, 8 Kelly, 289. Curan was surety for one Tharp, to Colbert, for \$250. Colbert sued the debt to judgment against both Tharp and Curan, and Curan pointed out sufficient property to pay the debt of Tharp's, who was then solvent. The property was levied on and released, Colbert taking Tharp's "word that he would pay at Christmas, without Curan's consent, before the expiration of the time." Tharp removed all of his property out of the State, and was insolvent. Colbert subsequently, and in the absence of Curan, levied on a wagon and team of Curan's and bought it at half its value under this execution. Curan brought trover for the wagon and team, and pending that action, filed a bill for discovery, &c. The bill was dismissed for want of Equity

Ryan vs. Lieber et al.

by the Circuit Court. This Court, on a review of that decision, held that there was Equity in the bill, and who will say that there was not? Yet, that was the whole of that decision, so far as the Court was concerned. What had a dismissal of the levy, so far as the rights of junior judgment creditors have to do with that decision? It is true, that the member of this Court who wrote out the opinion in that case, used some very strong expressions as to the effect of a dismissal of levy, &c, but they are mere dicta, by which the Court is not bound, has never pretended to be, but from its very organization has disclaimed them. It would be most strange and unjust, too, to the Court, the Law, and the rights of parties to have grave and important questions forever settled, when not made, by a loose and unguarded expression falling from one member of the Court on argument. But the effect of these dicta have too long been known and well understood by the profession at large to require from me a further consideration of them. It is sufficient to say, that the question before this Court now, was not in that case, nor there decided.

The next case referred to in support of the decision of the Court below, is that of *Newsome vs. McLendon*, 4 Ga., 392. Newsome and others filed a bill, alleging that, as sureties for Wormack, they had been compelled to pay large sums of money, and for their indemnity, he had conveyed to them in 1840 the premises on which he lived; that Wormack and one Jesse McLendon had been partners and had given their not to one Brown for same property, which became partnership property; that on the dissolution of the firm, the entire effects of the firm went into McLendon's hands, including the property for which the note was given to Brown. Brown obtained separate judgments on his notes before the date of conveyance from Wormack to the complainants; that the execution against McLendon was levied on an amount of property sufficient to have paid the same, and before the day of sale, Freeman and Jeremiah McLendon, with the assistance of, and for the purpose of enabling Jesse McLendon to have and to hold all the effects of the partnership to his own use, paid off the *fi. fa.* against Jesse McLendon, dismissed the levy on the same; caused an execution to be issued against, and levied on the premises conveyed to them for their indemnity; that Wormack was wholly insolvent, and dead; that

McLendon was solvent—had the effects of the firm in his hands to pay the debt; that at the time of the transfer to Freeman and Jeremiah McLendon by Brown, *Jesse McLendon paid a large portion of the money, and since that time has reimbursed Freeman and Jeremiah the amount they advanced for him on the f. fa.* The bill was filed for discovery and injunction. The Judge of the Circuit Court refused the injunction, and this Court decided that the complainants were entitled to the injunction, and the true grounds on which the decision was put, were, that the debt had been paid, and a discovery was necessary to prove the fact, and the additional one, which was the controlling one in the decision, was, that the debt was a partnership debt, and there were partnership effects sufficient to pay it, and these partnership effects must, in Equity, be exhausted before the separate property of the members of the firm could be reached. Judge NISBET, who wrote the opinion himself, never thought of putting the decision on the ground of a dismissal of the levy being a satisfaction or extinguishment of the lien, as to junior judgment creditors, who were not in the case, but as a question between partners and the sureties of one of them. He says: "Nor can I doubt but that a levy on personal property of one partner sufficient to pay the debt and dismissed by the plaintiff, with the consent of the defendant, would discharge the other partner." This is sufficient to show that he viewed what he was saying on this head, as but an argument; but whether he did or not, the question before us was not in that case, was not decided by the Court, nor was it necessary to sustain that decision to invoke this principle so well discussed in that case by the able Jurist who pronounced that opinion.

The other case relied on is that of *Lynch vs. Pressely*, 8 Ga., 330. That was a claim case. On the trial, the execution offered in evidence had a former levy indorsed on it of two negroes, which were claimed, but not otherwise disposed of. The Court below ruled it out, on the ground that the levy was evidence of satisfaction, and the plaintiff must show that it was unproductive without his fault. This Court, in deciding that case, held that the levy was accounted for by the evidence of the plaintiff's attorney; that he had dismissed the levy for a want of proof to condemn the property.

This case, instead of deciding as the Court below, rather estimated the other way. The Court was content with a

Ryan vs. Lieber et al.

weak sort of explanation; and Judge LUMPKIN certainly did deny that the Court had decided the question as claimed, and said that the complainants in *Newsome vs. McLendon* were entitled to the relief, upon grounds wholly independent of that of a dismissal of the levy; and all will agree with me, that the other grounds of Equity in that case constituted the gravamen of the bill.

But that this Court has regarded the question as an open one, I refer to *Marshall vs. Morris*, 18 Ga., 185. That was a claim case, and when the execution was offered in evidence, there appeared to be a former levy on it of some negroes, which had not been disposed of. The negroes were insufficient to pay the debt, and had been left, and continued in the possession of the claimant, the wife of defendant in execution. This Court said, that there was authority for the proposition, that a levy undisposed of is satisfaction, and a second execution cannot issue, and again, while it is not satisfaction as to defendant, it is as to third persons. Judge LUMPKIN referred to *Banks vs. Evans*, 10 Sm. & M., 35, and quotes the conclusion, which is: "That a levy on property is not payment, but only constructively so, to prevent wrong. It is deemed a payment in those cases where, if it were not, the defendant would be twice deprived of his property by the same judgment. In all other instances it is no payment," and a number of authorities referred to supporting that position. "And hence," he adds, "until further enlightened, I prefer to leave this point." The question has not been decided—is an open one, and so expressly stated to be in that case, and I can not but think it strange, that, under the circumstances, it should have been held that the Court so decided.

The question, then, occurs, What is the effect of a dismissal of a levy of personal property, the property being left in the possession of the defendant, as to junior judgment creditors? Does it displace the lien of a senior *fi. fa.* to that of junior judgments? For that is the question in this case. So far as this particular case is concerned, it is unnecessary for us to decide the question, for the levy dismissed was on the same property that was subsequently sold, and the proceeds of which formed the subject of controversy. That account for, and explains the first levy; that shows that the levy has not been productive, and it shows, too, that no body had be-

injured by the dismissal of the levy. But, as the question has been fairly made and discussed, and is one of constant recurrence in the Courts, we have felt it to be our duty to decide and end the question. And we hold, upon the authority of the cases referred to in *Marshall vs. Morris*, 13 Ga., 185, that a dismissal of a levy on a senior *fi. fa.*, leaving the property in the possession of the defendant, is not a satisfaction of the judgment; that it does not displace the lien of such execution or judgment, to that of junior liens; but that the fact that the levy is dismissed and the property left in the possession of the defendant, sufficiently accounts for, and explains such levy, so as to enable the plaintiff to enforce his lien by levy, in claiming money in Court, according to its priority, as effectually as though no such levy had been made. And why should not this be so upon reason and principle? If the property is left in the possession of the debtor, if his possession continues, he is not injured and loses nothing, and he cannot complain. If there be other judgment creditors having liens, their right to levy and force the property to sale is not effected thereby, and if they choose to force the property into market, to bring it to a sale, let them do so with their own liens. How are they injured? All the property is still there, as accessible to them and their process as it was to the older lien. If they have no lien and the property is subsequently removed by the debtor, that is his act, and not that of the creditor, nor is he or his lien to be affected by it. Of course, any fraudulent use of the prior lien between the creditor and debtor, by which other creditors were injured, would make a difference; but that must appear, and, of course, this decision does not affect the rights of parties, under such circumstances, for they stand on a very different footing.

That there may be found adjudications conflicting with this, we do not doubt; for all other Courts are governed by their own practice and the policy of the people for whom they are held. It is not the policy of the people of Georgia, that an execution should be pressed upon an unfortunate and embarrassed debtor, to its immediate satisfaction, and possibly his immediate ruin, but it has always been the policy of this State to encourage judgment creditors in the indulgence of, and forbearance with their judgment debtors; for they have passed laws, that these final processes may be transferred,

Molyneux vs. Seymour, Fanning & Co.

that the judgment need not be renewed from year to year, but that it shall remain open and in full force until satisfied by the payment of the money; and were we to decide that a levy once made must be disposed of by sale, let the consequences be what they may, either as to debtor or creditor, or the creditor would have his lien displaced, or his judgment satisfied without getting a dollar of his money, we would be going back to the dark ages that adjudged every debtor to be a criminal, and that the creditors must force a payment at once, or his lien was gone.

Judgment reversed.

MOLYNEUX vs. SEYMOUR, FANNING & CO.

1. All persons found within the limits of a Government, whether their residence be deemed permanent or temporary, are to be deemed, so far, citizens or subjects thereof, in that the right of jurisdiction, civil and criminal, will attach to such persons.
2. Although a non-resident come not within the territorial limits of a State, still, if he own property there, that will give the Courts jurisdiction.
3. If a non-resident have property in the hands of another, it may be reached by garnishment, the property itself, as well as the garnishee, being within the jurisdiction of the Court.
4. Personal property has no locality other than that of the person having the same in possession, ownership, custody or control.
5. M. owes C. a balance, both residing in Georgia. M. goes to South Carolina and is summoned by process of garnishment, at the instance of W. & W., creditors of C., to depose what he is indebted to C. W. answers, and admits an indebtedness, which he is directed by the Carolina Court to pay over to the hands of an assignee. W. is garnished in Georgia by S. F. & Co. to depose in the Courts of this State what he is indebted to C. He answers, and brings to the knowledge of the Court the fact of the South Carolina judgment against him for the same debt: Held, that it is error to ad-

erose M. to pay over the money a second time in this State, and that he was protected by the South Carolina judgment from further liability.

This was a Garnishment sued out by Seymour, Fanning & Co., calling upon E. Molyneux to depose what he was indebted to, or what effects of one Carmichael he had in his hands.

The facts of the case are sufficiently stated in the opinion of the Court.

WARD; JACKSON & JONES, for plaintiff in error.

GEORGE T. BARNES, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

We shall address ourselves to two questions only in this case, taking no notice whatever of the order given by Carmichael to H. F. Russell.

First, had the Court in Carolina jurisdiction of Molyneux? And secondly, if it had, had Molyneux an attachable interest in his hands belonging to Carmichael at the time the Carolina garnishment was served?

All persons who are found within the limits of Government, whether their residence be permanent or temporary, are to be deemed, so far, citizens or subjects thereof, as that the right of jurisdiction, civil and criminal, will attach to such persons. And although the non-resident come not within the territorial limits of a State, still, if he owns property there, this will give the local Courts jurisdiction; so that jurisdiction can be rightfully exercised, whether founded upon the person being within the territory or upon property within the territory. *Story on Conflict of Laws*, §§539, 543, 550; *Phillmore on International Law*, p. p. 355, 368, 373.

This doctrine has been recognized and enforced in every State of the Union. It is no longer a debatable question.

If a non-resident debtor have property in the hands of another, it may be reached by garnishment, the property itself, as well as the garnishee, being within the jurisdiction of the Court. The learned Judge who decided this case, conceded that if the non-resident garnishee have in the State where he

is garnisheed, and when he is garnisheed, property of the defendant in his hands, or he is bound to pay the defendant money at some particular place in the State, or to deliver to him goods at some particular place in the State, that then he may be garnisheed.

We submit, there is no foundation in reason for such a distinction. Has he property of the defendant's in his hands which may be surrendered up? or does he owe him an attachable debt? which, of course, follows and adheres to his person.

Molyneux was served personally with the process in Charleston. He is responsible, then, to the Courts of South Carolina. *Drake on Attachments*, §409, *et passim*; 15 *Ohio R.*, 445; 1 *Cushing R.*, 27; *Kerr's Action at Law*, 171, 178; 2 *Amer. Lead. Cas.*, 724, 725, 726 *et seq.*; 9 *Mass. R.*, 482, 470; 4 *Comstock R.*, 875, 876, 878; 6 *Texas R.*, 275; 21 *Vol. Law Reporter*, No. 5, p. 296; *Id.* Vol. 8, No. 5, p. p. 801, 804; 43 *Eng. Com. Law Rep.*, 487; 3 *Douglas*, 281.

If Molyneux, after service, had made no return, the Court would have regarded this as an admission, on his part, that he had assets and given judgment against him for the amount of the plaintiff's claim. 2 *Bailey S. R.*, 212, 218; 2 *McCord Rep.*, 224, 225; 1 *Bay's Rep.*, 484.

Personal property has no locality other than that of the person having the same in possession, ownership, custody or control. *Drake on Attachments*, §436; *Story's Conflict of Laws*, §§880, 882, 888, 890.

Molyneux could at any moment have given a draft for the balance in his hands, and thus have passed the property and possession at the same time.

The person of the garnishee, then, being within the jurisdiction of the South Carolina Court, and he being personally served with the regular process of that Court, the fund also being within the jurisdiction of that Court, it being purely personal, a balance due Carmichael, the jurisdiction of that Court was complete, both as to the person and subject-matter; and the jurisdiction of that Court having first attached, the Courts in this State will not coerce the garnishee to pay second time.

Could not Carmichael have sued Molyneux in South Carolina and held him to bail upon this demand while Molyneux

Molynaux vs. Seymour, Fanning & Co.

was passing through Carolina, or temporarily there upon business? If so, is it not clear, that the creditors of Carmichael could have reached the debt due Carmichael, by garnishment? Does not principle demand this?

Molynaux was served personally in Charleston on the 19th of December, 1856. On the 5th of May thereafter, he filed his return, admitting \$2,814 09 in his hands coming to Carmichael. On the 28d of March, 1857, he was garnisheed in Georgia, at the instance of Seymour, Fanning & Co. To this latter summons Molynaux filed an original return on the 23d of May, 1857; and an amended answer February 15th, 1859. In his return to the Courts of each State, he admitted his indebtedness to Carmichael, the fact of this fund being first garnisheed in his hands in South Carolina, and insisted upon the exclusive jurisdiction of the Courts of that State; and in his amended return in this State, the further fact of the final order of the South Carolina Court, directing and requiring him to pay the amount admitted to be in his hands to Goldtham Walker, the regularly appointed assignee of that Court, under the Law for that purpose, and that he had paid over said sum.

The return thus made in this State was not traversed. Molynaux had acted with the most perfect good faith. No steps were taken by the Georgia creditors to interplead or otherwise interfere with the proceeding in Carolina, although thus brought to their knowledge by the deposition of Molynaux.

Is it possible that, under these circumstances, he shall be adjudged to have paid this money wrongfully in South Carolina? And wherefore? Why, because the South Carolina attachment was not *effectually* levied, the balance due by Molynaux to Carmichael not being an *attachable* debt. Who made the Courts of this State an appellate tribunal, to review and reverse the judgment rendered in South Carolina? Is not as full faith and credit to be given to this judgment as if rendered in one of the Courts of this State? Is not every presumption in its favor, that it was rightfully rendered? Does the fact affirmatively appear upon the face of these papers anywhere that it was not? The Constitution of the United States, to say nothing of the *comity of States*, requires us to presume that there was sufficient proof before the South Carolina Court to authorize the judgment which they awarded.

Dunning & Tuttle vs. Stovall et al.

The simple truth in this case is, that Wardlaw and Walker, in the exercise of superior diligence, have got the start in the race of Messrs. Seymour, Fanning & Co.; and the same may have happened had both proceedings been instituted in this State; and the Courts can afford them no relief.

We hold, then, that the Court in South Carolina had jurisdiction, and we are bound to presume—because it has been so adjudged by a Court of competent jurisdiction—that Molyneux had an *attachable* interest in his hands belonging to Carmichael at the time the Carolina garnishment was served. Nothing appears upon the face of the proceedings to rebut this presumption; but, on the contrary, the proof sustaining the exercise of jurisdiction, and consequently that the Court was wrong in ordering judgment to be entered up in this State, compelling Molyneux to pay the money in his hands a second time.

DUNNING & TUTTLE vs. STOVALL *et al.*

1. The Act requiring certain liens to be enforced within twelve months is not affected by the subsequent Statute, fixing the first of January of the year ensuing as the time when open accounts shall bear interest, and also from which the Statute of Limitations shall begin to run.
2. A proceeding instituted against the proper parties to enforce a mechanic's lien may be converted into a regular suit to recover the price of the work done and the materials found.

Statutory proceeding in Richmond Superior Court. Decision by Judge HOLT at January Term, 1860.

This was a petition filed for the purpose of enforcing a lien under the mechanics lien Laws of this State. It appeared from the petition and bill of particulars annexed, that more than twelve months had elapsed from the last date of the so-

count sued on, before the petition was filed. The defendants demurred and the Court sustained the demurrer.

The plaintiffs moved, thereupon, to strike out so much of the declaration as referred specifically to the enforcement of the lien, and to amend so as to proceed against the trust estate under the Act, giving Common Law jurisdiction in collecting claims against trust estates.

The Court below refused this motion, and awarded a nonsuit against the plaintiffs.

Subsequently, during the same term, the counsel for plaintiffs moved to re-instate the case upon the ground that the Court had committed error in the foregoing rulings. This motion was also refused, and the counsel for plaintiffs excepted to all said decisions.

L. D. LALLERSTEDT, for plaintiff in error.

MILLERS & JACKSON, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

As the plaintiffs did not sue upon a special contract, the presumption is, that the contract was completed when the last item in the Bill of Particulars was charged. They rely upon that, and they must abide by it. They will not be permitted to prove any thing to the contrary, unless it was averred in the writ. We do not think the late Statutes making open accounts bear interest from the first day of January of the year next following, and that the Statute of Limitations shall not begin to run until that time, applies to the Lien Laws.

Ought the amendment in this case to have been allowed? The plaintiffs proposed to abandon their lien and convert the proceeding into an ordinary action against the defendants as trustees for Mrs. Caroline Dearing and children for a dwelling house, materials found by the plaintiffs, for the benefit of the trust estate.

And why not? We can see no objection to it. Whether when there are trustees, the Act of 1856 intended that the *certain* *trusts* should be made co-defendants, is not altogether clear. But whether this be so or not, or you are only required to name them as you do the trust property, still we see no insuperable objection to the allowance of the amendment.

Tweedy vs. Urquhart.

TWEEDY vs. URQUHART.

In a deed of marriage settlement occurs this clause, "That should said trust at any time become vacant by death or resignation of said party of the second part, (the trustee,) or any of his successors, the said Isabella M. (the wife) by writing under her hand and seal, may appoint any other person or persons trustee in place of said party of the second part." In another part of said deed there was this clause, that the trust property should be held by the trustee for the sole use of the wife, "separate from and wholly free of the control of her said intended husband, or any future husband, and not liable for any debt or contract of either." The trustee named resigned, and the wife appointed one McBride, who also resigned. The wife then in writing, under seal, appointed her husband as her trustee in lieu of McBride.

Held,

1. That the deed did not exclude the wife from appointing the husband as trustee.
2. That the husband was not excluded by Law from receiving the appointment from the wife.
3. That the appointment of the husband in lieu of McBride, instead and in place of Garvin did not defeat the appointment.
4. That the appointment was good and vested the legal title of the trust property in the trustee so appointed.

Complaint for slaves, in Burke Superior Court. Decision by Judge Holt, May Term, 1860.

This case was tried in the Court below by a petit Jury, and a verdict rendered for the plaintiff for \$6,394. The defendant moved the Court for a new trial, which was granted by the Court below.

An ante-nuptial settlement was entered into between Ephraim Tweedy and Isabella M. Hadley in contemplation of a marriage between them. The negroes sued for were described in the settlement, and the title thereto vested in Ignatius P. Garvin as trustee. The terms of the trust are as follows:

"To have and to hold, all and singular the Slaves above mentioned, with all future increase of the females, to him, the said party of the second part, and to his successors, as he and their own proper goods—in trust—always and for the sole use, benefit, and behoof of the said Isabella M. Hadley, separate from, and wholly free of the control of her said intended husband, or any future husband, and not liable for

any debt or contract of either, for and during her natural life; and on her death, the trustee, for the time being, is to convey the whole trust estate then in his hands, as said Isabella M. Hadley, by writing, in nature of a Will, attested according to Law, may appoint; and in default of such Will to any children, or issue of any children which she may leave, each child, and the descendants of each deceased child, taking one share; and if she leaves no issue living at the time of her death, then the trustee for the time being, is to convey the whole estate to said Ephraim Tweedy, should he survive her: Provided, always, that the trustee for the time being may, at any time, by deed or bill of sale, in which said Isabella M. voluntarily joins, sell any part or the whole of said trust estate, re-investing the proceeds on the same uses and trusts as above set forth."

The provision in the settlement for the appointment of a new trustee, was this:

"And provided, also, That should said trust at any time become vacant, by death or resignation of said party of the second part, or any of his successors, the said Isabella M. by writing under her hand and seal, may appoint any other person or persons trustee, in place of said party of the second part; and the person so appointed shall immediately and *ipso facto*, become entitled to all the right and authority hereby conferred on said party of the second part."

Ignatius P. Garvin having resigned the trust, the wife of Tweedy, prior to the commencement of this suit, appointed her husband, the said Ephraim Tweedy, trustee under said settlement. The plaintiff title was derived through said settlement and appointment.

The decision of the Court below, upon the motion for a new trial, is as follows:

"A verdict having been returned in favor of the plaintiff; defendant moves for a new trial on several grounds, only the first and second of which, is it necessary in the opinion of the Court to consider, as upon them the motion should be allowed. The action is for the recovery of the negroes, and to entitle the plaintiff to a recovery, he must show his title. The title shown was the appointment made by his wife under a power contained in the marriage settlement between him and his wife. The whole case turns upon the validity of this appointment. If valid, the Court has no doubt of the correct-

ness of the verdict; but the Court holds the appointment to be void, as not within the power contained in the settlement, and to be excluded, both by the relation of husband and wife, and by the terms of the settlement. If this position be true, the plaintiff has no title.

"The counsel for the plaintiff contend that he may recover though the appointment be void; that the trust being vacant he would hold as trustee for his wife: but however Equity might consider him, he can only recover here upon a legal title. As the Court believes the verdict to be contrary both to Law and evidence, it sustains the motion; let the verdict be set aside and a new trial granted, to be tried by a special Jury."

To which decision, granting a new trial, the plaintiff by his counsel excepted, and assigns error thereon.

MILLERS & JACKSON, for plaintiff in error.

JOHN T. SNEWMARK, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

The only question in this case is this, Whether the appointment of the plaintiff, Ephraim Tweedy, as trustee, by his wife Isabella, the *cestue que trust* is a good appointment, and is sufficient to vest in him the legal title to the trust estate? The Court below, on the application for a new trial, held that the appointment was not, and did not clothe him with the legal title to the trust estate, and granted the new trial on that ground. Which decision was excepted to, and the cause comes before us for review on that single ground. It is insisted by counsel for the defendant in error, that the appointment was void, because the husband was excluded by the terms of settlement, and that it is prohibited by Law, that is, that as the appointment was the subject of, or matter of contract, and as the husband and wife were one in Law, the contract was void, and that the appointment was made in lieu of McBride instead of Garvin, the trustee named in the marriage settlement. In reply to these objections, or rather arguments, for they constitute all that can be said in support of the decision complained of, we say:

1. The deed of marriage settlement does not exclude the

husband from taking the appointment of trustee; it is true that there is a clause in the deed, that the property therein secured to the separate use of the wife, shall be "wholly free of the control of her husband, or any future husband, and not liable for any debt or contract of either;" but this clause was intended to, and did only, exclude the marital rights of the husband, or that interest in, or title to, the property, which, but for such settlement, would have vested in him by the marriage. Such clauses are to be found in all marriage settlements, or nearly all, and yet how often is such clause to be found in these settlements, when the husband himself is named the trustee therein? The clause was not intended to, and does not exclude the husband from such control or interest in the property as the wife may think proper to give him. She is not excluded from giving him the control, or he from taking it by her consent. How does his appointment or office of trustee change the right of the husband in the trust property? We cannot see. It does not give him the control of the property as husband, that is, in his own right, it only enables him to control the property as trustee for the wife, and as her agent, not otherwise.

2. But if the husband is not excluded by the deed from the appointment, does the Law exclude him, or in other words, is the appointment by reason of the relation of the parties void? Most assuredly not. In all these cases when the separate property of the wife is not in the name of any trustee, the Law deems the husband as the trustee. *Story Eq.* 1880. Then, where the trust is vacant, and the husband in consequence is deemed the trustee, why should the appointment by the wife be bad when she does that only which the Law declares without? Independently of this, "in Equity the wife may bestow her separate property by appointment, or otherwise upon her husband as well as upon a stranger. *Story Eq.* 1895. If she may do this, why may she not appoint him trustee? That this is so in Equity, does not alter the question, for it is but a question of power and of right, and if allowable in Equity, and been exercised, the appointment, when made, becomes a legal right, and must be so recognized by the Courts of Law as well as of Equity.

3. That the appointment was made in lieu of McBride instead of Garvin, makes no sort of difference; the trust was vacant by the resignation both of Garvin and of McBride, and

Wade & Co. vs. Hamilton et al.

the deed of settlement provides "that should said trust become vacant at any time by death or resignation of Garvin or any of his successors, the said Isabella M., by writing under her hand and seal, may appoint any other person or persons, trustee in place of said party of the second part." The main thing was the right to appoint in case of a vacancy; that was given, and that she has exercised properly; that she stated that the appointment was in lieu of McBride, was immaterial, she need not have stated any thing about it; the trustee so appointed takes the place that Garvin held in the deed.

4. So we think the appointment was rightfully exercised, and vested the legal title in the appointee, and that the new trial ought not to have been allowed.

Judgment reversed.

WADE & CO. vs. HAMILTON et al.

1. A delivery of cotton to a common carrier for a consignee, and its acceptance by the carrier for the consignee, when there was a previous agreement between the consignee and consignor, that the latter should send the cotton to the former, is a delivery to the consignee.
2. The interest which will support a claim under our Statute, is any interest which renders the property not subject to the levying *fi. fa.* or attachment, or which is inconsistent with the plaintiff's right to proceed in selling the property.

Certiorari, in Chatham Superior Court from the City Court of Savannah, decided by Judge FLEMING at the May Term 1859.

This was an attachment in favor of E. C. Wade & Co against James Hamilton, levied on five bales of cotton as the property of defendant in attachment. *Laws: & Additions*

Wade & Co. vs. Hamilton et al.

interposed their claim to the cotton, and the validity of that claim was the question. The Judge of the City Court held it to be invalid; Judge FLEMING reversed the decision, and that reversal is the error assigned. The facts of the case were agreed as follows: James Hamilton obtained an advance of \$250 from the claimants, upon a promise that he would send them five bales of cotton, out of the proceeds of which they were to reimburse themselves and pay over to him any surplus. He accordingly placed the cotton upon a steamer, having marked it "Lawson & Addison," and with instructions to deliver it to them on its arrival at Savannah. The steamer discharged the cotton upon the wharf when she arrived at Savannah. E. C. Wade & Co. levied their attachment, (founded upon an advance made by them as factors,) and the claimants interposed their claim.

HAMILTON COUPER, for plaintiff in error.

NORWOOD, WILSON & LESTER, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. We think that Hamilton's delivery of this cotton to the common carrier for the claimants, and the carrier's acceptance of it for them, with their expectation and consent, that it should come to them in that very mode, was a delivery to them. The argument was, that the carrier was not *their* agent, but the agent of Hamilton, and that therefore, the possession had never got to them. The facts of this case constituted the carrier agent of both parties. Hamilton was acting for himself in selecting the carrier; but he was also acting for the claimants in that very same act of selecting an agent. He was doing precisely what he agreed to do for them, sending cotton to them for their benefit, and selecting for them, in pursuance of his agreement to do so, an agent to carry it. The carrier was selected for them by their agent for that purpose, Mr. Hamilton, and the agent so selected *accepted* for them. The delivery being to them their lien as factors immediately attached to the cotton.

2. But it was said, that granting their lien to have attached, they could not assert it by a *claim*. Their lien gave them such an interest as entitled them to payment of their debt in

Wade & Co. vs. Hamilton et al.

preference to the plaintiff's in attachment, and we think that was interest enough to support a claim under the Statute. The very question to be tried in a claim case is, whether or not the claimant has such an interest in the property as renders it *not subject* to the attachment or *fi. fa.* Nor does this view conflict in the least with the previous rulings of this Court, that the claimant is not entitled to interrupt or interfere with the process of the plaintiff against the defendant in execution, except upon the strength of his own interest in the property, analogizing the claimant to a plaintiff in ejectment or trover who must recover upon the strength of his own right, and not upon the want of right in his adversary. An uninterested person cannot interfere to raise the issue of subject or not subject, but surely he may so interfere, whose very interest renders the property *not subject*. We are entirely satisfied, both as to the right and as to the remedy.

Judgment affirmed.

Dec. et dem. Sheftall et al. vs. Roe, Casual Ejector, and Roberts.

**DOE *ex dem.* SHEFTALL *et al.* vs. ROE, Casual Ejector,
AND ROBERTS.**

1. Testator, by one clause in his Will, provides: "Respecting my tract of land called the Tanyard, it is my will that the same be equally divided between my heirs, hereafter named, but that they shall not have it in their power to dispose of or sell any of their shares for twenty years;" and by another: "It is my will that whatever part or share of my estate, either real or personal, which shall come to either of my daughters, hereafter named, the same shall not be liable, under the control, or subject to any debt or debts of any husband they may intermarry with; that before any such intermarriage shall take place, the portion of my estate which they shall inherit, shall be settled on trustees for their sole and only use, and to be disposed of by my said daughters as they may think proper." *Held*, That these provisions do not vest or give an unlimited power of disposition, but only of such interest as they take under the other clauses of the Will.
2. That if a testator gives, in one part of his Will, an absolute estate, and in a subsequent clause cuts down such estate to a less interest, the prior gift is restricted accordingly.
3. *In Re*, by his Will, provided: "In case of the death of either of my children, to-wit: B., H., J., M., E., S., A., or A., before the division takes place, or after, without issue legally begotten, then, and in that case, the portion of him or them so deceased shall be only inherited and divided between my heirs, the survivor, or survivors, of my eight children, heretofore named. In case of my sons or daughters should intermarry and die, leaving issue legally begotten, they shall not inherit their father's or mother's portion of my estate before they attain the age of eighteen years, and in case of the death before they attain that age, the property of the father or mother so deceased shall return to the children: I mean the eight so often mentioned." *Held*, That the limitation was not void for remoteness, but that the devise was limited to take effect on a definite failure of issue.

Tried before Judge FLEMING, in Chatham, in May, 1859.

On the 26th day of May, in the year 1859, during the regular Term of the Superior Court of Chatham county, His Honor WM. B. FLEMING, one of the Judges of the Superior Courts for the State of Georgia, presiding, the cause of John Doe on the demise of Solomon Sheftall and Abigail M. Hart, heirs and devisees of Levi Sheftall, against Richard Roe—that is to say, Hiram Roberts, tenant in possession, being an action of ejectment pending on the Common Law side of the Superior Court of Chatham county aforesaid, on

Dec. et Jan. Sheftall et al. vs. Rev. General Executor, and Heirs.

appeal, came on to be heard; whereupon, it was then and there agreed in open Court, between the counsel for the plaintiff and for the defendant, that the construction of the last Will and Testament of Levi Sheftall, (a copy of which is hereunto annexed as a part of this bill of exceptions,) under which the lessors of the plaintiff claimed title, and the plaintiff asserted his right to recover, should be submitted, upon argument, and a special verdict to His Honor the presiding Judge, who might render his decision thereupon in vacation. In pursuance of which agreement, argument was then and there had for the plaintiff and defendant; and afterwards, on the eighth day of June, in the year aforesaid, during the said regular Term of the said Court, the Jury, having been regularly empaneled and sworn, rendered, by consent of counsel for the plaintiff and defendant, a special verdict in the said cause, which appears of record.

The said Judge afterwards, to-wit: on the 2d day of August, in the year 1859, rendered and filed his decision in writing, wherein, among other things, he decided that the children of Levi Sheftall, under whom the defendant claims, did not take under the Will of the said Levi Sheftall, estate for life only, but estates of inheritance in *fee-simple*, in the property in question; and that the limitations over, in favor of the survivor or survivors of the children of the said Levi Sheftall, contained in the concluding clauses of the said Will, are too remote.

Whereupon, counsel for the plaintiff excepted, and say—

1st. That His Honor erred in deciding that the children of Levi Sheftall, under whom the defendant claims, did not take, under the said Will, estates for life only in the property in question.

2d. That His Honor erred in deciding that the children of the said Levi Sheftall, under whom the defendant claims, took, under the said Will, estates of inheritance in *fee-simple*, in the property in question.

3d. That His Honor erred in deciding that the limitations over, in favor of the survivor or survivors of the children of the said Levi Sheftall, in the concluding clauses of his said Will contained, were too remote.

4th. That the decision of His Honor is erroneous and contrary to Law.

COPY OF WILL OF LEVI SHEFTALL.

"STATE OF GEORGIA, CHATHAM COUNTY:

"In the name of God, Amen. I, Levi Sheftall, of the city of Savannah, in the county and State aforesaid, being of sound mind and memory, and knowing that it is appointed for all men to die, but being certain of the resurrection of the dead, do hereby declare this to be my last Will and Testament, in manner and form following, revoking all former wills and testaments heretofore made or done by me, imploring my Creator to receive my soul into His holy keeping. Respecting my burial, I have left written directions to my family; therefore it is useless to mention it here. As to my worldly affairs, which it has pleased God to bless me with, it is my will that my executors and executrix have full power and liberty to sell and dispose of any part of my estate, either real or personal, if it is thought by them and my heirs to be of benefit to the estate, but not otherwise, except that tract of land known by the name of the Tanyard, contiguous to Savannah, which will be hereafter mentioned in what manner it is to be disposed of. All sales made by my executors and executrix must be with consent of my heirs, or the Court of Ordinary, and the monies arising from such sales must be invested in other property, real or personal. Should it so happen that any dispute arises between my heirs, every such dispute shall be left to, and determined by three respectable and indifferent persons chosen by the parties, and whose decision shall be final and binding, and if either of the parties should be dissatisfied with the said decision, and institute an action, he, she or them so doing shall only be entitled to Ten Dollars as their share of my estate, both real and personal, and such forfeited share or shares shall be equally divided amongst my heirs—I mean my sons and daughters at present unmarried, and them only. This I do in order to prevent my heirs going to law with each other. It is my will that my dear wife, Sarah Sheftall, shall keep in her possession my houses, negroes, and every species of my property for and during her life; but in case she marries, then and in that case she shall only draw an equal share of my estate with my heirs.

"It is my will that what I leave to my heirs—the profits

Doe et dem. Sheftall et al vs. Roe, Casual Ejector, and Robert.

of which being sufficient to maintain them decently—they keep together and live in the house or houses until a division takes place—that is, if they think proper. No division of my estate shall take place during my wife's widowhood; that when the time arrives when a division must take place, it shall be in the following manner: The value of the property shall be first ascertained by three respectable appraisers, then be sold agreeably to advertisement on a particular day, to the highest bidder, on a reasonable credit, taking bond and mortgage on the property sold or disposed of, and further security, if my executors and executrixes think proper. The purchase money must be paid by instalments, so that the youngest child may have an equal chance with the eldest, as it is my wish that every one of my heirs may be well satisfied with what is done; therefore, whenever my sons and daughters arrive to the age of nineteen years, then they be considered my executors and executrixes equal to those that may be qualified.

"Respecting my tract of land called the Tanyard, it is my will that the same be equally divided between my heirs hereafter named, but that they shall not have it in their power to dispose of or sell any of their shares for twenty years after my decease. It must be clearly understood that the whole of the tract of land is meant by the name Tanyard, which contains upwards of forty acres, including the surplus, for which said surplus I have a grant of upwards of thirty years old. My heirs may lease or build on any part of it for them to reside on; (if leased) the profits must be for the benefit of them all. Lot (20) twenty I recommend the greatest care of, its being near this city, its value is great.

"It is my will that whatever part or share of my estate, either real or personal, which shall come to either of my daughters hereafter named, the same shall not be liable, under the control or subject to any debt or debts of any husband they may intermarry with; that before any such marriage shall take place, the portion of my estate which they inherit shall be settled on trustees for their sole and only use, and to be disposed of by said daughters as they may think proper.

"My son, Levi Sheftall, was possessed of a half lot of land in Savannah, (adjoining Robert Greer's,) and a negro boy named Carolina, and as he died in Charleston, and on his

Dec et dem. Sheftall et al. vs. Roe, Casual Ejector, and Roberts.

death-bed requested his uncle, Mr. Emanuel De Larnetta, to remember he left his property to his God-son and brother Abraham Sheftall, and my said son Levi Sheftall being a minor at the time of his death, and leaving no will, and the property coming to me, as his father, under the laws of the State, I therefore, in compliance with his request, bequeath to my son, Abraham Sheftall, the said half lot and negro boy named Carolina, as his property forever after the decease of his mother, this property to be his, exclusive of his share of my estate, real or personal, which he may be entitled to.

"I give and bequeath to my son Solomon my negro boy named Cork, as also the sum of three hundred dollars, this sum to be paid him when my estate is divided; these gifts are exclusive of his equal share of my estate, both real and personal. I give to my son, Emanuel Sheftall, my negro boy named London. This gift is also exclusive of his equal share of my estate, both real and personal. I give to my son, Mordecai Sheftall, a negro wench named Sprouncer, with her four children, to-wit: Rose, George, Venus and Jane, and her future issue and increase, to him forever after the decease of his mother. This gift is exclusive of his equal share of my estate, both real and personal.

"It is my will that my estate be divided in the following manner, and to the following named persons only; that is to say, to my dear wife, on the conditions before mentioned; to my son Benjamin Sheftall, one share, under certain conditions that will be hereafter mentioned; to my daughter Hannah Sheftall, one equal share of my estate; to my daughter Judith Sheftall, one equal share of my estate; to my son Mordecai Sheftall, one equal share of my estate; to my son Emanuel Sheftall, one equal share of my estate; to my son Abraham Sheftall, one equal share of my estate; to my daughter Abigail Minis Sheftall, one equal share of my estate; to my daughter Perla, the wife of Isaac Russell, I give the sum of five dollars; this is all she shall have of my estate, both real and personal—this to be paid her after the division aforesaid. No support shall be given her out of my estate on any pretence, and it is my will that my executors and executrixes do not, on any consideration, suffer her to dwell on any part of my land or live in any of my houses; I give to my dear daughter Sarah DeLyon, the wife of Abra-

Benjamin DeLydn, Sheftall et al. vs. Ben, Casual Ejector, and Roberts

ham DeLydn, the sum of ten dollars; this to be considered a full share of my estate, both real and personal. I gave my daughter Sarah DeLydn, at her marriage, a valuable property—more than any of my children will inherit from me; this is the only reason, and not a want of parental affection, that I have left her in my Will ten dollars.

“The part of my estate, real and personal, which I give to my son Benjamin Sheftall, is subject to the following conditions, and absolutely bound by the following trust, and upon no other terms or conditions shall he enjoy any part of my estate: To my sons Mordecai Sheftall and Emanuel Sheftall, in trust for my son Benjamin Sheftall, an equal share of my estate, both real and personal, the said Benjamin Sheftall to have and receive the rents and issues and profits of the property aforesaid for his support and maintenance during the term of his natural life, and not to be subject to the debts of the said Benjamin Sheftall; but in case he should marry and die without issue legally begotten, then and in that case the said property, both real and personal, and the profits thereof, shall be divided between my heirs, hereafter named, to-wit: Hannah Sheftall, Judith Sheftall, Mordecai Sheftall, Emanuel Sheftall, Solomon Sheftall, Abraham Sheftall, and Abigail Minis Sheftall, and no other person whatsoever. But should he leave issue at the time of his death, lawfully begotten, in that case, they shall have and receive that portion of the estate which was vested in the hands of the trustees for the use of the said Benjamin Sheftall, provided they live to the age of eighteen years, not otherwise; and in case they do not live to the age of eighteen years, then and in that case the property shall revert to my heirs, Hannah, Judith, Mordecai, Emanuel, Solomon, Abraham, and Abigail Minis Sheftall.

“In case of the death of either of my children, to-wit: Benjamin; Hannah, Judith, Mordecai, Emanuel, Solomon, Abraham or Abigail before the division takes place, or after, without issue legally begotten, then and in that case the portion of him or them so deceased shall be only inherited and divided between my heirs, the survivor or survivors of my eight children, heretofore named. Lest a false interpretation may be given to my meaning in this my Will, I deem it highly proper to say, that in no case are my daughters Sarah DeLydn and Perla Russell, to inherit any part or portion of my estate on the decease of any of my eight children.

Dec et adm. Sheftall et al. vs. Roe, Casual Ejector, and Roberts.

"In case any of my sons or daughters should intermarry and die, leaving issue legally begotten, they shall not inherit their father's or mother's portion of my estate before they attain the age of eighteen years; and in case of the death before they attain that age, the property of the father or mother so deceased shall return to my children: I mean the eight which I have so often mentioned.

"It is my particular request and desire that my old faithful negro man, London, who has labored hard with me forty years and upwards, be kindly, carefully and well treated as long as he lives.

"I do hereby appoint my dear wife, Sarah Sheftall, executrix, my sons Benjamin, Mordecai and Emanuel Sheftall, executors, and my daughters Hannah and Judith Sheftall, executrices to this, my last Will and Testament, resigning myself to the mercy of my Creator, hoping that my soul will be received by Him.

"Done at the City of Savannah, this fourth day of July, eighteen hundred and eight, and in the thirty-third year of American independence.

"LEVI SHEFTALL, [L.S.]"

This Will was duly proved and recorded.

H. WILLIAMS, for plaintiff in error.

LLOYD & OWENS, and LAW, BARTOW and LOVELL, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

The controversy in this case grows out of the Will of Levi Sheftall and the disposition made therein of that part of his estate called in the will "the Tanyard tract."

The facts appearing from the record are, that Judith Sheftall and Hannah D'Lyon, widow of Abraham D'Lyon, two of the children of the testator, conveyed their shares in the Tanyard tract to the defendant, Hiram Roberts, and died subsequently without having had issue.

Solomon Sheftall and Abigail M. Hart bring this suit for the recovery of the premises so conveyed, as the only surviving devisees of the testator, and claim that, on the death of

Doe, ex dem. Shefall et al. vs. Roe. Casual Ejector, and Roberts.

Judith and Hannah, without issue, the title, under the Will, vested in them, as the survivors.

On the trial of the case in the Court below, the presiding Judge held, that under the Will, the children of the testator, or the first takers, took an absolute fee in the property on two grounds:

1st. That the absolute power of sale, given by the Will to the children of testator, carried the fee.

2d. That the limitation over was too remote, or created an estate-tail in the first takers, and thereby vested the fee absolutely in them.

Does the Will give to the children an absolute or unlimited power of disposition? We think not. The clauses of the Will from which this power of disposition is claimed, is, first: "Respecting my tract of land called the Tanyard, it is my will that the same be equally divided between my heirs, hereinafter named, but that they shall not have it in their power to dispose of, or sell, any of their shares for twenty years after my decease;" which, it is said, is equivalent to saying that after twenty years they shall have the power to dispose of, or sell any of their shares. Concede that, and the most that can be claimed is, that they may sell their shares; that interest which they take in this tract under the Will. This power of disposition is consistent with the estate given. It no more vests in them the power of absolute and unlimited sale and disposition of the land, than the part of this clause which directs a division among the heirs, vests in them the whole title. The power is next claimed as to the daughters, in the next clause; that is, "It is my will that whatever part or share of my estate, either real or personal, which shall come to either of my daughters, hereafter named, the same shall not be liable, &c.; that before any such marriage shall take place, the portion of my estate which they shall inherit, shall be settled on trustees, for their sole and only use and to be disposed of by my said daughters as they shall think proper." Now, if, according to a proper construction of this Will, nothing was given to them in the Tanyard tract but a life-interest, either expressly or by implication, or life-estate to be enlarged into a fee on the having of issue, what else, is not that the part or share given, or the portion which they will inherit, all the power is given to dispose of. We think so. But allow that we are wrong, has there be

a marriage and settlement on trustees with power to the daughters to sell? To all of which, the power is *restricted*. It is not pretended. Again: Concede that we are mistaken in this view, and that these clauses do give an unlimited power of disposition, and hence carry the absolute fee, and a subsequent clause of the Will, expressly or by implication, cuts down such interest to a life-estate or other estate less than a *fee-simple*, this clause giving the power must give way to the subsequent disposition. "If a testator, in one part of his Will, gives to a person an estate of inheritance in lands or an absolute interest in personalty, and in a subsequent passage unequivocally shows that he means the devisee or legatee to take a life-interest only, the prior gift is restricted accordingly." 1 *Jar. on Wills*, 412. So that the whole question turns upon the construction to be given to the following clause:

"In case of the death of either of my children, to-wit: Benjamin, Hannah, Judith, Mordecai, Emanuel, Solomon or Abigail, before the division takes place or after, without issue legally begotten, then and in that case, the portion of him, her or them so deceased shall be only inherited and divided between my heirs, the survivor or survivors of my eight children, heretofore named;" and further: "In case any of my sons or daughters should intermarry and die, leaving no issue legally begotten, they shall not inherit their father's or mother's portion of my estate before they attain the age of eighteen years, and in case of their death before they attain that age, the property of the father or mother so deceased, shall return to my children: I mean the eight which I have so often mentioned." Is the limitation over void for remoteness? We think not. The superadded words in the last clause granted, to-wit: "leaving issue legally begotten, they (the issue) shall not inherit their father's or mother's portion of my estate until they attain the age of eighteen years," plainly import, that the issue meant the children of the first takers, and that the limitation must, of necessity, take effect within eighteen years after the death of testator's children, and that the estate shall either vest then in such issue or go over.

There is another circumstance in this Will which more conclusively shows, to my mind, that the testator did not intend an indefinite, but a definite failure of issue, and that is this,

Doe ex dem. Shefall et al. vs. Roe, Casual Ejector, and Roberts

to be found in the clause immediately preceding those under consideration; I mean the provision in relation to Benjamin's share of this same property, the testator says: "but in case he (Benjamin) should marry and die without issue legally begotten, then and in that case, the said property, both real and personal, and the profits thereof, shall be divided," &c. But should he leave issue *at the time of his death*, lawfully begotten, in that case, they shall have and receive that portion of the estate which was vested in the hands of trustees for the use of said Benjamin, provided they live to the age of eighteen years—not otherwise; and in case they do not, then over. Looking to this item, then, as a manifestation of the intention of the testator, as to when the limitation should take effect, can any doubt but that he intended a definite failure of issue? The contingency in that case depends on *his leaving issue at his death*. If he did not intend an indefinite failure in the one case, he did not in the other. It is of the same property, the limitation over is to the same persons, and it is only to make a separate provision as to Benjamin's use of the property during his life, that this clause was inserted in the Will. He (Benjamin) is equally included under the next clauses—is expressly named in them; in fact, these three several clauses, forming, as they do, the testator's final and general disposition of the residuum of his estate, in which all of the devisees are alike interested, must be taken and construed together to get the testator's intention; and so taken, it is clear that the limitation over is on a definite failure of issue, and therefore good.

Judgment reversed.

R. A. ALLEN vs. B. W. HARDEE et al.

1. An administrator is not liable for interest during the first year after his appointment, unless he actually makes interest.

Caveat to Application for Letters of Dismission, on the Appeal, in Chatham Superior Court. Tried before Judge FLEMING, at May Term, 1859.

The ground of this caveat was, that Allen, the administrator, by his treatment of the fund, had made himself liable for interest upon the proceeds of sales within the year next after his appointment, and had not accounted for such interest. The sole question was, whether he had or not made himself liable for interest within the year, and the sole evidence on the point was that of Allen himself, who was introduced by the caveators. His testimony was as follows:

"On receiving the proceeds of sale of the negroes, and paying out the expenses of administration, of the support and sale of the negroes, &c., I deposited the balance in the Bank of Savannah, to the credit of 'R. A. Allen & Son,' as I kept no individual Bank account, and deposited all my own funds in that name. In checking on the Bank, no special notice was taken of the amount due the estate on deposit there with other funds; but there was no day from the time of this deposit until the distribution of the fund in January thereafter, when I could not have paid over the entire amount to the distributees; and I would gladly have done so, had I not been advised by counsel that it would be unsafe for me to pay out before the expiration of the year. The average deposit in that Bank was far above the amount due the estate of Hardee; though I have no doubt on many days during that period, it was much less than that amount. To the best of my knowledge, neither R. A. Allen & Son nor myself individually, made any interest or divided any profit from this fund. It might have been of some service during the 'tight times' in the Fall of 1857, but for the fact that I knew it had to be paid out in January, 1858, in the very midst of the crisis. On the first of January, 1858, the entire amount was paid to the creditors *pro rata*, who held notes, the assets being insufficient to discharge them in full, or to pay anything towards open accounts."

Allen vs. Hardee et al.

Judge FLEMING charged the Jury, in substance, that these facts made the administrator liable for interest, although he had paid out the whole fund within the year next after his appointment. The administrator excepted to the charge, and, the verdict being against him, now assigns it as error.

LAWTON & BASINGER, for plaintiff in error.

NORWOOD, WILSON & LESTER, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

Our Statute prescribing the order in which different classes of the debts of a deceased person shall be paid, and allowing creditors twelve months within which to give notice of their claims, leaves the administrator no safety but in holding all the assets until the expiration of that twelve months. Now, as the Law itself puts him under the necessity to hold the funds for his own protection, it will not charge him with interest during that time. Within the year next after his appointment, he is therefore under no *obligation* to make interest. It seems to me, then, that the only other question is, *Has he, in point of fact, made interest?* Is it possible that an administrator shall be held accountable for interest in a case where he has *neither made it, nor ought to have made it?* The statement in this case is, that he did *not* make interest. If the money had been lost, and the question were, whether the administrator is responsible for it, or stands acquitted by the use of due diligence, then, the manner in which he kept it would be material. But in an inquiry as to his liability for *interest*, the only questions are, *Has he made interest? ought he to have made it?*

Judgment reversed.

KIRKPATRICK *et al*. vs. THE BANK OF AUGUSTA
et al. HOPE *et al*. vs. MOORE & PHILPOT. NEW-
 BY vs. HOPE *et al*. WHITE *et al*. vs. HOPE *et al*.

1. The lien given for negro hire, for negroes employed in steamboats and other water craft on certain Rivers in this State, does not extend to the Savannah river.
3. A mortgage given to the Bank of Augusta was foreclosed upon the affidavit of John Bones, as President of the Bank of Augusta, instead of as President of the Corporation, viz: "The President, Directors and Company of the Bank of Augusta." *Held*, That the irregularity—if it be such—was not material.
3. By the Act of 1847, (Cobb, 557,) liens against steamboats may be enforced by the creditor, his attorney or agent; and by the same Act, a demand made on the owner of the boat, his agent or attorney, is sufficient.
4. No lien is given by Statute for services rendered, and materials furnished for the construction of a boat "whilst getting ready for navigation." It must be after it has actually entered upon the navigation.
5. The Statute gives a lien to "machinists" only, and not to those who merely vend machinery.
6. It is sufficient, under the Act of 1847, to state, that the boat upon which the lien is claimed, has "arrived at her place of destination," without the additional words, in the language of the Act of 1841, "to which she was last freighted."
7. The lien given by these various Acts, takes date from the judgment.
9. To invest a vessel with a character of nationality, it is necessary that it be entered at the Custom-House, and in a contest between foreign creditors of said vessel, or a foreign creditor and our own citizens, no lien, under our State laws, would be available, unless the same be recorded or registered as required by the Act of Congress, in the Office of the Collector of Customs. But a failure to do this will not displace a lien already acquired under our own laws, in a contest between our own citizens.
9. The Act gives a lien for "wood and provisions"—not for "supplies"—furnished steamboats.
10. Where an individual or a company own several boats, the lien provided by Law for wood, provisions, &c., is not restricted to any one boat, but covers the whole, and the judgment may be entered up against all, provided all have reached their point of destination, or as they severally arrive there. But if entered against one or more only, it is restricted to the money arising from the sale of the boat or boats against which the judgment is entered.

Rule against the Sheriff, from Richmond county. Decision by Judge HOLT, in vacation, on 25th April, 1860.

These four cases were consolidated and argued together.

Kirkpatrick *et al.* vs. The Bank of Augusta *et al.*

A rule having been taken against the Sheriff, requiring him to show his actings and doings under certain *fi. fas.*, he made a return thereto, showing that he had in his hands, subject to distribution, a considerable sum of money, raised by a sale of the steamboats John A. Moore, Columbia and Talomico, and that said sum of money was claimed by divers persons under liens against said boats, by virtue of the Steamboat Lien Laws, and by Joseph M. Newby, under certain Common Law *fi. fas.*, and by the President, Directors & Co. of The Bank of Augusta, under a mortgage *fi. fa.* The mortgage of The Bank of Augusta was prior, in point of date, to the said judgments in favor of said Joseph M. Newby; and said mortgage having been recorded in the Clerk's office of the Superior Court of said Richmond county, within three months after the date thereof, and never recorded at all in the office of the Collector of Customs; and said "John A. Moore" having been, on the 5th day of August, eighteen hundred and fifty-nine—subsequent to the date of the said mortgage—duly enrolled in the office of the Collector of Customs, at Savannah, Georgia.

By consent of parties, certain questions of Law, arising out of said claims, were submitted to His Honor, Judge HOLT, with leave to except to his decision when made. Among others, the following questions were submitted:

Where the affidavit sets forth that provisions or wood were furnished to the "Fashion Line," to-wit: the John A. Moore, Columbia, and Talomico, without separating the amounts, or specifying the amounts furnished to each, and the judgment is rendered against the defendants and the three boats, (without any separation or specification, as above stated, can the same be enforced?

Where such separation or specification is made in the affidavit, but not in the judgment or *fi. fa.*, can the judgment be enforced?

Do the several Acts giving a lien for labor performed, services rendered, &c., upon steam-boats navigating the Savannah River aforesaid, authorize a lien for negro hire?

The mortgage of The Bank of Augusta not having been recorded in the office of the Collector of Customs, where it is insisted, the "John A. Moore" is, or ought to have been registered or enrolled, is it valid as against the other claimants to the fund, who have not had actual notice?

In the case of the mortgage *fi. fa.*, in favor of The Bank of Augusta, the affidavit is in the name of "John Bones, President of the Bank of Augusta." It is suggested that the affidavit does not run in the name of John Bones, as President of the Corporation, viz: "The President, Directors and Company of the Bank of Augusta?" and it is submitted whether or not this is legal?

Where the affidavit to enforce a lien, other than for negro hire, is made by the attorney at Law, or agent of the plaintiff, can the lien be enforced?

Can judgments, founded upon the three following affidavits, be enforced?

AFFIDAVIT OF SOLOMON C. WHITE.

STATE OF GEORGIA, RICHMOND COUNTY:

Before me, Benjamin H. Warren, a Justice of the Inferior Court, in and for said county, came in person Solomon C. White, of said county, who, after being duly sworn, deposes and says, that he has been employed on a steamboat named or called the "John A. Moore," belonging to Samuel Moore and Thomas N. Philpot, of Augusta, in said county, in the capacity of a *painter*; that he was so employed by said owners, on the fourteenth day of April last past, and remained on said boat performing the services of a painter until the twenty-seventh day of May, said steamboat being, during that time, at her wharf in the city of Augusta, getting ready for navigating the Savannah River, and which said boat, since her completion, has been, and is now, navigating the Savannah River; it being agreed by, and between deponent and said owners, that he should receive, as pay for such services, the sum of two dollars and fifty cents a-day; that said steamboat has arrived at its place of destination, to-wit: the city of Augusta, and is now lying in the said county of Richmond; that the sum of one hundred and forty-eight dollars and seventy-five cents is due to the deponent by said owners for services as painter, performed by him on said steamboat, "John A. Moore," as aforesaid; and that since the said amount became due, and within twelve months afterwards, on the twenty-third day of June last, he demanded payment by himself of said amount so due to him as aforesaid, of the said owners, Samuel Moore and Thomas N. Phil-

Kirkpatrick et al. vs. The Bank of Augusta et al.

pot, personally, in said county, by whom payment of said amount was refused, and deponent has, therefore, a lien on said steamboat according to Law.

Sworn to and subscribed before me, this 10th day of August, 1859.

(Signed)

SOLOMON C. WHITE.

In presence of B. H. WARREN, J. I. C. R. C.

AFFIDAVIT OF WILLIAM H. GOODRICH.

STATE OF GEORGIA, RICHMOND COUNTY:

Before me, William W. Holt, Judge of the Superior Court of said county, personally appeared William H. Goodrich, who, being duly sworn, deposes and says: That Thomas N. Philpot and Samuel Moore, of said county, are the owners of the steamer "John A. Moore," a steamer navigating and running on the Savannah River; that said steamer has arrived at the landing port, or place of destination to which she has been freighted, and is now lying at the wharf in the city of Augusta, in said county. And deponent further swears, that there is due to him by said Thomas N. and Samuel, owners of said steamer, the sum of three thousand one hundred and seventy dollars and sixteen cents, for labor and services by him, done and performed on board of said steamer "John A. Moore," and for materials furnished in the building of said steamer. Deponent further swears, that the whole of said sum has become due and payable within the last twelve months; that he has this day demanded of the said Thomas N. and Samuel, the payment of said amount, which they refused; and the twelve months having not yet expired, this deponent claims a lien on said steamer "John A. Moore" for said amount.

(Signed)

WM. H. GOODRICH.

Sworn to and subscribed before me this 11th day of November, 1859, at thirty minutes past three o'clock.

WM. H. HOLT, Judge of S. C. M. Dist.

AFFIDAVIT OF WM. SCHLEY.

STATE OF GEORGIA, RICHMOND COUNTY:

Personally appeared William Schley, who, being duly sworn, says, that Thomas N. Philpot and Samuel Moor

both of said county, are justly indebted to him in the sum of three thousand dollars, and interest thereon from the fourth day of January, eighteen hundred and fifty-nine, for machinery which has been furnished by him to said Thomas N. Philpot and Samuel Moore, and which has been by them put up and used in the steamboat called the "John A. Moore," in said county, and in the Savannah River in said State; that said steamboat is engaged in the navigation of said Savannah River, and said Thomas N. Philpot and Samuel Moore are the owners thereof; that said steamboat has arrived at the landing port, or place of destination, to which the same was freighted, to-wit: the city of Augusta, in said county, and is now lying at the wharf in said city; that said debt became due and payable by said Thomas N. Philpot and Samuel Moore, to deponent, on the fourth day of January, eighteen hundred and fifty-nine; and that deponent has since that time, and heretofore, made a demand upon the said Thomas N. Philpot and Samuel Moore, the owners of the said steamboat, "John A. Moore," for the payment of said debt, which was refused by them. Wherefore, deponent claims a lien upon said steamboat, according to the Statutes in such case made and provided.

(Signed)

WILLIAM SCHLEY.

Sworn to and subscribed before me this 1st day of September, 1859.

B. H. WARREN, J. I. C. R. C.

The Court below made the following decisions :

1st. That said Acts did authorize the lien for negro hire, for negroes employed on steamboats now navigating the said Savannah River.

2d. That said mortgage, under the facts stated, is valid against the other claimants to the said fund, who have not had actual notice.

3d. That the affidavit of John Bones, President of the Bank of Augusta, is legal, though it does not run in the name of John Bones, as President of the Corporation, viz: "The President, Directors and Company of the Bank of Augusta."

4th. That the lien can be enforced, though the affidavit be made by the attorney at Law, or agent of the plaintiff.

5th. That the said lien of Solomon C. White did not bring his case within the terms of any of the Acts giving a lien

Kirkpatrick et al. vs. The Bank of Augusta et al.

upon steamboats, and that the judgment in his favor was void.

6th. That the affidavit of Wm. H. Goodrich did not bring his case within any of the Acts creating a lien upon steamboats, and that the judgment in his favor was void.

7th. That the affidavit of Wm. Schley did not bring his case within any of the Acts creating a lien upon steamboats, and that the judgment in his favor was void.

8th. That a demand for the payment of the money made upon the agent of the owners of the boat, was a demand which was legal and sufficient.

9th. That it was sufficient to state in the affidavit, that the boat upon which a lien was claimed had arrived at her place of destination, without the additional words, "to which she was freighted."

10th. That among the several judgments enforcing liens against the boats, there is a priority of lien, taking its date from the time when the debt became due, and in the case of a debt composed of several items from the date of the last item.

11th. That where the affidavit sets forth that provisions or wood were furnished to the "Fashion Line," without separating the amounts, or specifying the amounts furnished to each, and judgment is rendered against the defendants and the three boats, without any such separation or specification as above stated, it cannot be enforced.

12th. That where the affidavit sets forth that provisions, &c., were thus furnished the three boats, without a specification of the amount due by, or furnished to each, and judgment is rendered against the defendant, and one boat, it cannot be enforced.

13th. That where the provisions, wood, &c., or services rendered, are supplied to two boats according to the affidavit, and judgment is rendered against the two, or against one, without any specification in the proceedings of the particular amount due from each, the judgment cannot be enforced.

14th. That where the affidavit sets forth that the provisions, &c., were supplied to the three boats, and that one has arrived at the place of destination, the lien cannot be enforced against the three boats, and the judgment entered against the three is void.

15th. That the affidavit of Charles Grim, deposing that the defendants, "owners of the Fashion Line of Steamboats

to-wit: the John A. Moore, Columbia, and Talomico, navigating and running on the Savannah River, in said State, are indebted to him in the sum of \$1,323 00, for services rendered by this deponent, as a machinist and carpenter on board the same, and in running said steamboats during the present year; that said sum is due, and has been admitted by John A. Moore, the agent of said owners; that he has demanded payment thereof from said agent personally, which was refused; and that two of said boats, to-wit: the Talomico and John A. Moore, are now lying at one of the wharfs in the city of Augusta, in said county, the port or place of destination, &c.," (judgment against two of the boats,) does not bring the affiant's case within the Statutes, and that the judgment cannot be properly entered against two of the boats, viz: the Talomico and John A. Moore.

16th. That in another case, the affidavit of Charles Grim, deposing that the defendants, "owners of the Fashion Line, to-wit: the John A. Moore, Columbia and Talomico, navigating and running on the Savannah River, in said State, are indebted to him in the sum of \$1,323 00, for services rendered by this deponent, as a carpenter on board the same, and in running the said boats during the present year; that the said sum is now due; that he has demanded the same from John A. Moore, the agent of said owners, personally, which was refused; and that one of the said steamboats, to-wit: the Columbia, is now lying at one of the wharfs in the city of Augusta, &c.," (judgment was rendered for the whole sum against the Columbia,) does not bring the case within the Statutes, and judgment cannot be taken in such a case against one boat.

17th. That the affidavit of James Hope, "that the following negro slaves, belonging to him, the said James Hope, to-wit: Billy and Joe, Bob and John, have been employed on the steamboats Columbia, Talomico, and John A. Moore, belonging to what is usually known as the 'Fashion Line,' said steamboats being owned by Samuel Moore and Thomas N. Philpot, both of said county, and said steamboats being engaged in the navigation of the Savannah River; that the owners of said steamboats are indebted to the said deponent in the sum of \$2,367 67, besides interest on \$1,200 00 of said sum from the 10th day of November, 1857, to 8th day of November, 1859, for services rendered by said slaves on

Kirkpatrick et al. vs. The Bank of Augusta et al.

said steamboats, to-wit: in the sum of \$800 00 for services rendered by Billy and Joe, on said steamboats, from the 10th of November, 1858, at the rate of four hundred dollars per annum for the services of each; in the sum of \$178 78 for services rendered from the 10th day of November, 1858, until the 1st day of November, 1859, at same rate, by same slaves, Billy and Joe, &c.; in the sum of \$400 00 for the services of the said Bob and John, rendered at the rate of two hundred dollars each per annum, from the 10th of November, 1857, until the 10th of November, 1858, and in the sum of \$388 89 for services rendered by said Bob and John at same rate of \$200 00 each per annum from 10th Nov., 1858, to 1st Nov., 1859, and that said sum of \$2,367 67 became due, and payable, and within twelve months afterwards he demanded payment, by himself, of said amount, &c., of John A. Moore, the agent of said owners, personally, in said county, by whom payment was refused, &c.; that one of said steamboats—the Columbia—has arrived at its place of destination, &c.," (judgment against the defendants and the three boats, November 8th, 1859,) is not a compliance with the Law, and the judgment is not legal.

18th. That a similar affidavit of James Hope, in another case, in which a claim is set up "for services rendered by said slaves, on the said steamboats, &c., for and on account of services commencing on the 10th day of November, 1858, and ending 1st day of November, 1859, (to the amount of 1,167 67;) that within twelve months he demanded payment himself of said amount, of John A. Moore, agent of said owners, personally, in said county, by whom payment of said amount was refused; that two of said steamboats, Talomico and John A. Moore, have arrived at their place of destination, to-wit: the city of Augusta, &c.," (November 18th, 1859, judgment against the defendants, and the three boats,) is not a compliance with the Law, and the judgment is not legal.

19th. That after judgment a party cannot amend his bill of particulars; that the power of the Court is to distribute money, not to amend judgments.

To these various decisions different parties excepted.

E. STARNES, MILLER & JACKSON, JOHN T. SHEWMAN, WILLIAM A. WALTON, GEORGE T. BARNES, L. D. LALLESTEDT, E. J. WALKER, for the parties.

By the Court.—LUMPKIN, J., delivering the opinion.

In the matter of the distribution of the money arising from the sale of the steamboats, John A. Moore, Columbia and Talomico, known as the "Fashion Line," engaged in the navigation of the Savannah River, the Court submits the following opinion upon the points covered by the various bills of exceptions:

1. We do not think a lien for negro hire, for negroes employed on steamboats and other water craft, on various rivers in this State, extends to the Savannah River.

The first Act, passed in 1841, (*Cobb's Digest*, 426,) gives a lien for wages due the various employees on boats, for personal services; and extended to the Chattahoochee, the Altamaha, and the Ocmulgee Rivers. In 1842, this Act was so amended as to include the Savannah River within its provisions. (*Cobb*, 428.)

The Act of 1845 extended the provisions of the Act of 1841 to Flint River; and it recites, that "whereas, it frequently happens that persons employed on steamboats and other water craft on the Chattahoochee, Altamaha, Ocmulgee and Flint Rivers, are negroes and free persons of color: *Be it, therefore, further enacted*, that whenever any negro, being a slave or free person of color, shall be employed as pilot, engineer, first or second mate, fireman, deck hand, or in any other capacity whatever, on all steamboats and other water craft engaged in the navigation of said rivers, to-wit: the Chattahoochee, Altamaha, Ocmulgee, and Flint rivers, that then, in all such cases, the owner, master, agent, attorney in law or in fact, shall have the like remedies for wages, &c." (*Cobb*, 429.)

This is the first and only Act giving a lien for negro hire; and either by accident or design, Savannah River is clearly excluded from its provisions. If there can be a case where the expression of four rivers will exclude a fifth, it is this. We dare not amend the Act, by adding to it.

It is said that these three Acts are in *pari materia*. Grant it; and make the three constitute three separate sections of the same Statute, and the same result follows.

2. We see no defect or irregularity of the foreclosure of the mortgage to the Bank of Augusta.

Kirkpatrick *et al.* vs. The Bank of Augusta *et al.*

3. By the Act of 1847, (*Cobb*, 557,) the party himself, his attorney or agent, may enforce the lien, provided against steamboats and other water craft, and by the same Act, a demand made on the owner of the boat, his agent or attorney in fact, is sufficient.

4. The claims of Solomon C. White and William H. Goodrich were properly excluded, they being for services rendered in constructing the boat. There is no lien given by Law for such indebtedness.

5. The demand of William Schley is obnoxious to the objection that it does not appear by his affidavit or in any other way, that he was a "machinist," and it is only to such that this preference is given—not to such as merely sell machinery.

6. We concur in the opinion, that it is sufficient to state that the boat upon which the lien is claimed, has arrived at her place of destination, without the additional words, "to which she was last freighted," in the language of the Act of 1841.

7. Our opinion is, that the lien given by these various Acts neither takes effect from the time the debt is due, nor from the date of the last item, when the debt is composed of several items, but from the date of the judgment.

8. We hold that the mortgage lien in favor of the Bank of Augusta was not lost or displaced by the failure to have it recorded in the Custom House at Savannah. By the 1st § of the Act of 1850, (*Brightly's Digest*, 1888,) it is declared, that "no bill of sale, mortgage, hypothecation or conveyance of any vessel of the United States, shall be valid against any person other than the granter, or mortgager, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the Collector of Customs where such vessel was registered or enrolled."

This lien had been created and recorded in the Clerk's Office of the Superior Court of Richmond county, which was notice to all the citizens of Georgia, if not to all the world, long before this vessel was enrolled at Savannah. This is a conflict between domestic creditors—our own citizens—and growing out of, and connected with, our own internal commerce. True, from the time she was enrolled, the *John A. Moore* was in a condition to engage in the coasting trade

North or South, from New Orleans to Boston. She never, in point of fact, however, left our own waters. This is no conflict between foreign creditors and our own citizens, but between our own citizens, whose rights were fixed by the registration of the Bank mortgage in Richmond county, before the enrollment of the vessel in the Custom House at Savannah. Nor could liens thus acquired be divested by that *ex post fact*. Otherwise, a wide door would be opened to the perpetration of the grossest frauds.

9. The Act gives a lien for "wood and provisions"—not for "*supplies*." *Supplies* is provided for under the Act of 1842, furnished to steam saw-mills only, and not to steam-boats.

10. The next point to decide in this litigation is, whether any or all the liens provided, by this class of legislation is to cover all the boats belonging to a company, or is to be restricted to a particular boat? The Legislature seems to have supposed that there could be but one boat belonging to an individual or a company, whereas the fact is notorious that all the boats navigating the Savannah River at the date of these several Acts were joint-stock boats. The Fashion Line is in this category.

To hold that the vendor of provisions, which are sent to a common depot or ware-house to be distributed out to the several boats, as their necessities may demand, shall keep a separate account against *each*, is impossible. True, in some instances this might be done; in others, it could not. Moreover, there is no reason why it should. Every service rendered and everything furnished accrues to the benefit of the Company generally, immaterial upon which boat it is done.

After much reflection, our conclusion is, that any one having a claim falling within the Statutes, may foreclose against all the boats; and this he may do at the same time, provided they all have reached their destination, or at different times, as they may severally arrive. A foreclosure against any one or two of the three is good; but then the creditor is restricted to the fund arising from the sale of the boat or boats against which his judgment has been entered up.

The question as to the equitable distribution of the money in Court, in this case, has not been brought up for the judgment of this Court, and we know not that it was expected that we should express any opinion respecting it. As it may

Foster vs. Jenkins & Belt.

save further litigation, we would suggest, that it will depend more upon general principles, than anything special in the Acts we have been reviewing. Some rule must be adopted which will protect the mortgage lien until the other fund is exhausted. For the balance respectively due the specific lien creditors whose claims are valid, will be entitled to come in upon the proceeds of the John A. Moore.

FOSTER vs. JENKINS AND BELT.

1. Before the testimony of a witness, as to the identity of hand-writing, can go to the Jury, the witness must express what amounts to an opinion, one way or the other, at the time when he is testifying, under the circumstances then existing.
2. If error has been committed by the Judge in putting the case before the Jury, he ought to grant a new hearing, when there was evidence enough to support a different verdict.

Action on Notes. Decision by Judge HOLT, at April Term, 1860, of Jefferson Superior Court.

This was an action in the short form, upon two promissory notes, purporting to have been executed by defendant's intestate. The pleas were the general issue, *non est factum*, and failure of consideration. The Jury having rendered a verdict in favor of plaintiff, the defendants moved the Court for a new trial, upon the following grounds:

- 1st. Because the verdict is contrary to the evidence.
- 2d. Because it is contrary to the weight of evidence.
- 3d. Because it is decidedly and strongly against the weight of evidence.
- 4th. Because the Court erred in admitting the evidence of George Cuyler to the Jury against defendant's objection, and witness not answering that he believed the signatures to be

the signatures of said (defendant's intestate) Patrick B. Connelly.

5th. Because the Court erred in forcing defendant to send to the Jury the letters attached by Robert Phinzy to his answers to interrogatories taken out for him by plaintiff and offered (without letters) by said defendants, said Court rejecting the said evidence without defendants sent them with it to the Jury.

6th. Because the Court erred in charging the Jury, that if they found said notes to have been given to said plaintiff by said Connelly for and in settlement of the legacy, by the Will of Thomas Street to the plaintiff's wife, the said consideration was sufficient, and said defendants estopped from denying the consideration thereof.

7th. Because the Court charged, "That if the notes sued on are for value received, they import a consideration, and, under the plea of failure of consideration, the defendants, relying upon that plea, must substantiate it by proof, which proof must show what the consideration is, and in what, and to what extent there is a failure," as requested by the plaintiff in writing.

The Court below granted a new trial upon the fourth ground alone, not expressing an opinion upon any other. The facts upon which the fifth, sixth and seventh grounds are based, are not certified to this Court.

The plaintiff excepts to this decision, because, as is alleged, the testimony of Cuyler was properly admitted, and because, even without the testimony of Cuyler, there was sufficient evidence to entitle him to the verdict.

A. R. WRIGHT, represented by J. S. Hook, for plaintiff in error.

JOHN T. SHEWMAKE, for defendant in error.

By the court.—STEPHENS, J., delivering the opinion.

1. The Judge granted a new trial in this case upon the ground that he had improperly admitted in evidence the deposition of Mr. George Cuyler, Cashier of the Central Rail Road Bank. His testimony does not express a belief existing at the time when his answers were given, that the signa-

Poster vs. Jenkins & Belt.

tures were genuine; but he says that if the notes had been presented to him at Bank, he thinks he would have paid them. The fair construction of this is, that he would have paid them if they had been presented without any notice that their genuineness was *contested*. Would he have paid them with notice of such a contest? He does not say, and that is the fatal omission in his statement. I was inclined to the opinion that his statement, as it stands, ought to have gone to the Jury for what it was worth; but my colleagues insisted upon a stricter rule, and I do not know but that theirs is the better opinion. Proof of hand-writing is, in its nature, the identification of an acquaintance, and the lineaments should be strong enough to enable the witness to pronounce in favor of the identity, against all the opposing circumstances. If his opinion does not come up to this standard, can he be said to have an opinion at all? He might or would think the writing to be his old acquaintance's under certain circumstances, but the question is, *Does* he think so, under the circumstances as they exist when he is giving his opinion? The strength of this view is, that while the witness may have a strong or a feeble opinion, yet, he must express what amounts to an opinion one way or the other, else he furnishes nothing which can enlighten the Jury. It is worthy of remark, that a large portion of the evidence on either side in this case, fails to come up to this standard.

2. But we are asked to affirm the verdict in this case by reversing the judgment granting a new trial, upon the ground that the evidence in support of it (aside from Cuyler's testimony) is so strong that a different verdict could not stand, and that it is but useless delay and expense to have a new hearing which could produce no different final result. The ground is a good one, if it were applicable to the case, but we cannot say, in the conflict of evidence which we have here, that a different verdict could not stand.

Judgment affirmed.

HUNTER, Endorser, vs. ROBERTSON AND ROBERTSON.

1. A payment by the principal or maker of a promissory note, before barred by the Statute, does not constitute a new point for the running of the Statute of Limitations as against the indorser or surety, unless such indorser or surety be a party to such payment.

Certiorari. Tried before Judge FLEMING, in Chatham, on 14th May, 1859.

HENRY WILLIAMS, for plaintiff in error.

WARD, JACKSON & JONES, for defendant in error.

By the Court.—LYON, J., delivering the opinion.

George Robertson and another, as the executors of William Robertson, brought suit in the City Court of Savannah against James Hunter, as the indorser of a promissory note, of which the following is a copy :

“SAVANNAH, January 13, 1851.

“\$200.

“On the first day of January, 1852, I promise to pay James Hunter, or order, two hundred dollars, for value received.

(Signed)

“JOHN C. HUNTER.

“Indorsed, JAMES HUNTER.”

On the 5th January, 1853, the maker paid twenty dollars on account of interest on said note, without the knowledge of the indorser, James Hunter, who had indorsed the note for the accommodation of John C. Hunter. The suit was commenced on the 5th of April, 1858. To that suit, the defendant plead the Statute of Limitations as a defense. The Judge of the City Court, on the trial of the case, held that the payment made by the maker on the 5th January, 1853, took the case out of the Statute, not only as against the maker, but as to the defendant, the indorser ; that that payment, as an acknowledgment of the subsistence of the debt at that

Hunter vs. Robertson and Robertson.

time, constituted a new point from which the Statute began to run, and that the statutory bar would not attach until six years from that time. This judgment having been referred to the decision of the Superior Court of Chatham, as by certiorari, was affirmed by that Court, to which the defendant excepted.

Is it true that a payment by a maker, and before the statutory bar has attached to the debt, is sufficient to take the case out of the Statute, as to the indorser, and constitute a new starting point for the Statute, as to him? That it is true as to a joint obligor, has been well settled by this Court. *Cox vs. Bailey*, 9 Ga., 467. In the latter case, the correctness of the principle, even as to joint contractors and partners, was gravely doubted by this Court; but as the question was no longer open, but an adjudicated one, the principle was adhered to, although a contrary holding would have been the better policy. The reason for the principle is, that, as between joint contractors or obligors and partners, there is a community of interest in that particular business, that what affects one, affects the whole; that the act of one is the act of all; that is, he is, in that matter, considered as the agent of the other partners. But can that be true as to indorsers? We think not. The contract of the indorser is a new and independent one to that of the maker. *Story on Promissory Notes*, §135. While there is, to a certain extent, a privity between them, there is not a community of interest, in all respects. The indorser is bound to the extent of his contract, and according to its term; that which will discharge an indorser will not always discharge a joint obligor. The contract of the indorser, under our Statute, is as surety for the maker; is accessory to his contract, and coextensive with it, but that is the contract simply to which the indorser accedes, if there be a new contract, a new undertaking, or any change in the old one, the liability of the security, or, as in this case, the indorser is gone; not so with the joint obligor his liability continues until the debt is paid. If there be change in the contract, he is supposed to assent to it, because of his common interest in the consideration and advantage of the contract. The security or indorser, on the other hand stands on his contract as such. Any modification of whether to his interest or against it, works his complete discharge, unless he agrees to it.

The theory of the principle, as decided by Lord Mansfield, in *Whitcomb vs. Whiting, Doug.*, 652, and which case the Courts in Georgia and elsewhere, recognizing this principle, have but followed, goes, according to my understanding, not only on the idea that the debt is a subsisting one, but that he, the obligor, making the payment, will pay the whole debt, and the Statute runs no longer against the old promise, but only against this new promise. If I am right in this, how can the indorser be affected by such new promise, to which he was no party and did not assent thereto? How can his original promise or contract be extended without his concurrence? It cannot be on principle. But again: If the principle is wrong when applied to joint makers—and there is no doubt in my mind but that it is—shall we extend it to an indorser on the same fallacious reasons? We think not; because, when it is attempted to be applied to an indorser or surety, another and more important principle will be violated; that is, the *strict right* of such indorser or surety to stand upon, and be bound by, his contract, to the extent, and in the manner only as he made it.

For these reasons, the judgment of the Court below must be reversed, it being the opinion of this Court that a payment by the principal or maker of a promissory note does not constitute a new starting point for the Statute of Limitations as against the indorser or surety, unless the surety or indorser is a party to such payment, and that the plea of the Statute of Limitations constituted a complete bar to the cause of action as against the indorser.

LUFBURROW vs. HENDERSON.

1. When a written agreement states a consideration in general terms, it is competent to show by *parol* the particulars included in the general description, in order to show that there has been a failure of consideration and the extent of it.
2. The doctrine of *rescurement* is but an improvement upon the old doctrine of failure of consideration. It looks through the whole contract, treating it as an entirety, and regarding the things done and stipulated to be done on each side, as the consideration for the things done and stipulated to be done on the other; and when a plaintiff seeks redress for the breach of the stipulations in his favor, it *sums up* the grievances on each side, strikes a balance, and gives him a judgment for only such *difference* as may be found in his favor.

Complaint, in Chatham Superior Court. Tried before Judge FLEMING, at May Term, 1859.

This was an action by the defendant in error against the plaintiff in error, on three promissory notes, which he read in evidence, and closed. The defendant then read in evidence a paper executed by the plaintiff, acknowledging the reception of these notes, together with several others executed by the defendant at the same time, and then stated the occasion of their being given, in these words: "Received for my interest in the firm of Henderson & Lufburrow, embracing *all things*, in return for which I pledge myself not to enter into opposition to the above O. H. L. (the defendant) in his present business, this binding me solely to the city of Savannah, any business transacted by me in any other place not to be considered as conflicting in any way with his interests."

Defendant then offered to prove by — Kent, in support of his pleas of failure of consideration, that the consideration of the three notes was the contract on the part of the plaintiff not to enter into an opposition business, and that that consideration had failed. On objection, the Judge excluded the evidence, and the defendant excepted, and assigns error thereon. The defendant then offered to prove that the words "all things" in said instrument included, among other considerations of value, the stand and good-will of the business in which plaintiff and defendant had been engaged, and which

plaintiff had sold to defendant as aforesaid, and that the sole consideration of these particular three notes, was the said stand and good-will. On objection, the Court rejected the evidence. The defendant excepted, and now assigns the ruling as error.

NORWOOD, WILSON & LESTER, for plaintiff in error.

LLOYD & OWENS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

The only reason stated in the bill of exceptions for the rejection of the proposed evidence, is, that the effect of it would be to alter and add to the written agreement. This reason applies only to so much of the evidence as went to show a verbal *contract* apportioning to these particular three notes, as their special and peculiar consideration, a certain part of that which the writing states as the general consideration of all the notes. That part of the evidence was properly rejected, but there was another portion which went to show, not a contract, but material facts. The writing evidences that Henderson had sold to Lufburrow his interest in their common business, embracing "all things." What were "all things," or what was any one of them? The writing gives no information on the point, and if the particulars, not of the *contract*, but of the *property* which falls within the terms of the contract, cannot be shown by *parol* proof, then this instrument and all other instruments which convey by terms of general description, are not worth the paper on which they are written. They are snares, and not contracts; for while they prove nothing themselves, they yet withhold the party who takes them from proving anything by other means. "All things" were the consideration of all the notes, and the Jury had to inquire of what these things consisted, what ones of them had failed, and what was the proportionate value of such as had failed. Whether or not there was a business stand and run of custom amounting to an item of value, and if so, what proportion that item bore in value to the other items composing the general consideration, were matters to be ascertained in arriving at any conclusion as to a failure of consideration and the extent of it, and matters

to be proven by anybody who knew the facts, or by the acknowledgments of Henderson. If he had said that the stand and run of custom was worth three thousand dollars, and had treated it as worth so much, those were proper facts to go to the Jury against him, not as showing a *contract to bind* him, but as any other piece of evidence, to assist the Jury in arriving at the true proportionate value of that item in the consideration. But surely the reason given, (that the evidence would alter or add to the written agreement,) cannot apply to that part which went to show that Henderson had violated his written agreement, by setting up an opposition business in Savannah.

2. It was attempted in the argument to justify the exclusion of this last named evidence and all the rest of it, upon the ground that the defendant cannot avail himself of these facts as a defense to this action, but must bring an action of his own for a breach of the agreement by the plaintiff. Cases there are which support such an idea, but they are outweighed by the strong reasons which have embodied themselves in the comparatively modern doctrine of *recoupment*, which is but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the *whole* contract, treating it as an entirety, and treating the things done, and stipulated to be done on each side, as the consideration for the things done, and stipulated to be done, on the other. When either party seeks redress for the breach of stipulations in his favor, it *sums up* the grievances on each side, instead of the plaintiff's side only, strikes a balance, and gives the difference to the plaintiff, if it is in his favor. It has not yet been carried so far as to give the *defendant* the difference which may be found in *his* favor, because he has not *sued*, and the Statute of Set-off does not apply to such a case. The Statute ought to be made to apply, and then the doctrine would be complete in its symmetry and in its Equity. The statement of it commends it to every lover of Justice. The defendant in the case before us only asked that the plaintiff's stipulation to refrain from opposition to him, might be valued by evidence, including the plaintiff's own assertions upon the point, and that he might be allowed for the breach of it, a proportional abatement from his stipulation to pay the notes. We think he was entitled to his demand.

Judgment reversed.

TOMPKINS vs. THE FEMALE COLLEGE.

1. However erroneous a proceeding may be, still, if it results rightly, and will be a bar to any future litigation, it will not be disturbed.

Action to subject Trust Property, in Columbia Superior Court. Decision by Judge HOLT, at March Term, 1860.

This was a Common Law suit, brought by the Georgia Female College against Sarah Tompkins, seeking to subject her trust estate to the payment of a debt contracted by her.

The plaintiffs offered evidence, showing that Sarah Tompkins placed her two daughters at the Georgia Female College at the time, and for the length of time, specified in the bill of particulars attached to the pleadings, and that the several items charged in the bill of particulars were correct. Plaintiff's counsel put in evidence a note given by Sarah Tompkins for the full amount of said bill of particulars, to the Georgia Female College, in settlement of said account. A letter was put in evidence from Sarah Tompkins, admitting the correctness of the claim, and promising to pay the amount. The statements made in the pleadings, in reference to a trust deed, conveying certain negroes and real estate to Sarah Tompkins, from John Tompkins, she being then a widow, during her natural life, and at her death to the children she then had, were admitted to be true. And that subsequently she intermarried with Frank Tompkins, and entered into an ante-nuptial agreement, by which all the property named in said deed was placed in the hands of Charles H. Hill, as trustee, freed from the management or control of said Frank Tompkins. It was further admitted, that Charles H. Hill, the said trustee, died long since, and that no new trustee had been appointed, at the commencement of said suit, and that Sarah Tompkins held and managed the said property herself. It was further admitted, that she had six children by her first husband, who were interested in this property, and that Susan, one of the children for whom the account was contracted, was the issue of her second marriage, and not interested in this property. The plaintiff having closed his case, the defendant's counsel asked the Court to charge—

- 1st. That unless the credit in this case was given to the

trust estate—and there is evidence to show that at the time the girls were placed in college, that the trust estate was pledged by Sarah Tompkins—they cannot recover from the trust estate, but must look to her individually for payment.

2d. That if they took her individual note, after the debt had been contracted, in pursuance of the agreement, that she alone was responsible, having no knowledge of the trust estate, the trust estate is not liable.

3d. That in order to make a trust estate liable, the debt must not only be contracted on the credit of the trust estate, but must be for the benefit of the trust estate, or the support of the *cestui que* trusts, and should be necessary and proper for their support, due regard being had to the condition and circumstances of the *cestui que* trust.

4th. That the articles charged in the bill of particulars are not such necessities as are contemplated by Law, due regard being had to the interest and support of the other children interested in the estate.

5th. That Susan, one of the children for whose benefit a part of this debt was contracted, is the issue by the second marriage, and no way interested in this trust estate, and that the trust estate cannot be bound in any way for the debt contracted on her account.

All of which requests to charge the presiding Judge refused, and charged the Jury, that Sarah Tompkins, being the life-tenant, can dispose of the income of the property as she sees fit, and that she is bound to educate her children, whether they are interested in this property or not; that a collegiate education is necessary and proper for girls in the present condition of society; and that as she contracted for their education at the Georgia Female College, she is bound to answer for the debt out of her life-estate, and that the Jury can find a verdict upon which a judgment can be entered, sequestering the property until its hire shall liquidate the debt.

To all of which charges and refusals to charge, defendant's counsel excepted, during said hearing of said cause, then in Court, and now here, and insist that the Court erred in refusing to charge as requested by defendant's counsel, and in charging as above alleged.

The Jury returned a verdict commanding the property to be taken in hand by the Sheriff, and hired out until the said debt should be paid.

Tompkins vs. The Female College.

Which finding of the Jury, defendant's counsel in 1860, is contrary to Law and evidence, and except for error.

The Judge presiding in the Court below adds the following statement to the bill of exceptions :

INSTRUCTIONS OF THE COURT.

That Sarah Tompkins, as life-tenant, could charge the estate for what was necessary for her or for the estate; that as mother, she was equally under obligations to provide for the education of all her children, whether interested in the remainder or not; that it was hers to determine the kind of education she could give her children, and that if she committed a mistake in that matter, and gave one not suited to her condition in life, her blunder cannot affect the right of those she may have employed for that purpose.

L. D. LALLERSTEDT, for plaintiff in error.

JOHN H. HALL, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The whole proceeding in this case was wrong. The cause of action does not fall within the Act of 1856, allowing real estates to be sued at Law, and consequently could not be properly enforced under it.

The facts in this case are briefly these: Mrs. Sarah Tompkins, while a widow, had certain property given to her for life, with remainder to her children. Being about to marry, again, she settled her life-estate to her separate use, with remainder to her children, from whom, of course, it could not be taken or diverted, and over which she had no dispositive power by deed or otherwise. Her second husband abandoned the country and has gone to parts unknown. She places a daughter of the second marriage at the Female College at Madison, to be educated. This of course is no trust debt, but the individual contract of Mrs. Tompkins, for which her life-estate in the property settled upon herself would be bound, and for which an action would be against her, her husband having abandoned the country; and by the verdict of the Jury, the thing works out precisely in this way, and

Bohannon vs. Jones.

if it be true that "all is well that ends well," why should the finding be disturbed?

True, the judgment is not in conformity with the absolute verdict, neither is it in accordance with the Statute of 1856. It directs the life-estate to be sold yearly, until the debt is satisfied, instead of directing it to be sold *in solido*. But as the defendant is not hurt by this modification in her favor, she should not be allowed to take advantage of the error. The only doubt is, whether a satisfaction under this trustee proceeding would bar another action instituted against Mrs. Tompkins individually? We hold that it would.

BOHANNON vs. JONES.

1. When one, who is Sheriff, has been compelled to pay off an execution, and the defendant therein pays a third person to pay the debt, and such third person promises to pay the Sheriff the amount he has paid on the execution for the defendant, having received the money for that purpose, the promise is good, and not within the Statute of Frauds, or obnoxious to public policy.

Assumpsit, in Dooly Superior Court. Tried before Judge LAMAR, at April Term, 1860.

This was an action brought by the plaintiff in error against the administratrix of Andrew J. Shine, deceased, upon an alleged promise of Andrew J., made in his life-time, to pay the amount due on a certain *fi fa.*, under the circumstances hereinafter developed by the evidence of the plaintiff.

On the trial, the plaintiff put in evidence the following facts:

Said Bohannon being Sheriff of Dooly county, levied a *fi fa.* in favor of J. B. and W. A. Ross vs. Jacob Slappy, for the principal sum of \$86, besides interest and costs, on a certain horse, the property of defendant in *fi fa.*, which horse

Bohannon vs. Jones.

was not sold by the Sheriff. It appears that afterwards the said Sheriff was compelled, in 1854, to pay the amount due on the *f. fa.*, amounting to \$84. It further appears, that at the time the *f. fa.* was levied, Andrew J. Shine, then in life, went to Bohannon and told him that if he would leave the horse with Slappy and not sell him, he, Shine, would pay Bohannon the amount due on the *f. fa.* Bohannon accepted the proposal, and did not sell. Slappy gave up the horse to Shine, who sold him to one Lane for \$90, cash, to secure himself on his promise to Bohannon; that Bohannon called on Shine after he had paid up the *f. fa.*, as stated, and Shine did not pay him, but promised him that he would do so. Shine died before paying the money.

The witness, Slappy, also testified, that Shine became somewhat angry with Bohannon; said he would not pay him; came to witness and wanted to pay him, witness; Shine paid Samuel Story twelve dollars and fifty cents; Connelly, one of witness' lawyers, twenty-five dollars, and two dollars and fifty cents tavern bill; promised to pay one Royal twelve dollars; the debts of defendant which Shine promised to pay, amounted to fifty-two dollars.

The defendant introduced no evidence, but moved for a non-suit, on the ground that the promise sued on, not being in writing, was void. The Court sustained the motion, and counsel for plaintiff excepted.

DAWSON, represented by LANIER & ANDERSON, for plaintiff in error.

DEGRAFFENREID, *contra*.

By the Court.—LYON, J., delivering the opinion.

The judgment of non-suit awarded by the Court below, was put on two grounds: 1st. That the promise of Shine to pay this debt was within the Statute of Frauds, being a promise, not in writing, to pay the debt of a third person. 2d. That the agreement was against public policy, and therefore void.

If the plaintiff had relied for a recovery on the first agreement made between Shine and himself, wherein Shine promised to pay the debt, if he, the plaintiff, would not, as Sheriff,

Clayton vs. Brown.

sell Slappy's horse for its payment, then the Court would have been right, for both reasons; but the plaintiff did not rely on that promise. After the plaintiff had been compelled to pay the amount due on the execution, it was a debt due to him, and he had the right to recover the same from Slappy, as for as much money paid to his use. While the debt was in that condition, the plaintiff called on Shine for the money, and Shine promised to pay it to him; that promise was good, and binding on him, because Slappy had previously paid Shine to pay this debt. He had put a horse in his hands to raise the money to pay this debt with. Shine had sold the horse to Lane for \$90, and received the money; that money he received to pay this debt, and was enough for that purpose. The debt then became his own debt, and not Slappy's. The promise created such a privity as enabled the plaintiff to recover. The Statute of Frauds was not enacted to suit such a case as that, nor is it within the Statute, nor contrary to public policy. The non-suit was improperly awarded.

Judgment reversed.

CLAYTON vs. BROWN.

1. Answers of one of the parties to interrogatories sued out under the Acts of 1847 and 1850, to compel discovery at Law, are not evidence for such party, unless in response to questions asked.
2. Evidence that is relevant cannot be kept from the Jury by a waiver of proof on that point or admission of the fact, if the party desires to have the testimony out.
3. In a question of *bona fides*, as to a settlement on wife and children by a debtor, proof of debts existing and outstanding against him at the time of the settlement is proper evidence, and a transcript from the record, of a mortgage, is competent for that purpose.

Clayton vs. Brown.

4. A settlement in favor of wife and children, or either, will be supported, if made in good faith and with no intent to defraud creditors; but one by a debtor in greatly embarrassed circumstances, of the bulk of his estate, leaving but a pittance, and insufficient for the debts, cannot be supported.
5. A verdict of a Jury, supported by the evidence and Law, will not be set aside, especially when no error of the Court is complained of.

Trover, &c., in Muscogee Superior Court. Tried before Judge WORRILL, May Term, 1859.

This was an action for a negro man, Charley, brought by Dempsey Brown against Philip A. Clayton. For a portion of the facts, see 17 *Ga. Rep.*, 217, the case having before been to the Supreme Court.

At the last trial in the Court below, the Jury found a second time for the plaintiff; and counsel for defendant moved for a new trial on the following grounds:

1st. Because the Court erred in rejecting that portion of the answer of Clayton which went to prove the value of the negro.

2d. Because the Court erred in admitting in evidence all that portion of the testimony of the witness, Hart, in two sets of interrogatories, which went to show the manner in which the negro went into the possession of Clayton, and what took place on the trip to Selma, Alabama, defendant's counsel admitting at the same time the conversion of the negro without proof.

3d. Because the Court erred in admitting in evidence, for the purpose of proving the indebtedness of Reeves, the transcript of the record from Bibb Inferior Court, going to show the indebtedness of Reeves, on a mortgage, to Clayton.

4th. Because the verdict of the Jury was without evidence and greatly against the weight of evidence.

It was proven that on the 22d day of November, 1837, James T. Reeves, by virtue of a marriage settlement, conveyed to Philip A. Clayton sixteen negroes, consisting mostly of men and women, to hold, in trust, for the sole and separate use of Amelia E. Reeves, his wife, "during her natural life and such children as may be the issue of the present marriage." Among the negroes thus conveyed was a boy sixteen years old, named Charles.

On the 15th day of November, 1841, in the Inferior Court

Clayton vs. Brown.

of Bibb county, William Holmes recovered a judgment against said James T. Reeves for the sum of \$184, with interest and cost of suit, from which a writ of *fi. fa.* was issued, and on the 15th day of May, 1845, was levied by William Hampton, Sheriff of Houston county, on the boy Charles, as the property of said Reeves. On the 6th day of January, 1846, the boy was sold at Sheriff's sale, and the plaintiff, Dempsey Brown, purchased him at the price of \$12. In April, 1847, the defendant, Clayton, as trustee for Mrs. Reeves, obtained possession of the boy, and shortly thereafter, Brown brought his action of Trover as above for said slave.

Pending the action, the plaintiff, Brown, propounded certain interrogatories, under the Act of 1847, to Clayton, to show who he had hired the negro to since he had had possession of him, the amount of hire he had received, &c. After answering plaintiff's questions, Clayton then went on and stated how much he thought the negro was worth, there being no question to authorize the answer. This answer was objected to, and the objection was sustained by the Court, as above appears.

To prove the conversion of the slave, plaintiff offered the answers to interrogatories of Crawford Hart, who stated that Brown placed the negro Charles in his possession to sell, and that he and the negro were traveling in a Jersey-wagon; that Clayton, in company with one Reeves, overtook them near Salem, in Alabama; that Clayton demanded the negro; witness proposed to take the negro back to Columbus and confine him in jail until Clayton's claims could be investigated; thereupon, they started back to Columbus, and as they were going along, Clayton asked witness to let him ride in the wagon, and to let the negro ride on Clayton's horse; witness consented; they stopped for some cause, when Clayton got out of the wagon, jumped on the horse of Reeves', and he and the negro ran off.

This part of the witness' answer was objected to by Clayton's counsel, who said they would admit the conversion. The objection was overruled, and defendant excepted.

To show indebtedness on the part of Reeves at the time he settled the negro on his wife, the plaintiff offered to read to the Jury a certified copy of proceedings had in Bibb Inferior Court on the part of Clayton, against Reeves, to establish a lost mortgage, note, &c. the mortgage being dated September

4, 1857, to secure the payment of \$350; also, the foreclosure of said mortgage; and also, a transcript of other proceedings in said Court on the part of Clayton, against Reeves, to establish the copy of the *fi. fa.* issued on the foreclosure of the mortgage; which transcript further showed that the copy *fi. fa.* so established was delivered to the Sheriff of Bibb county 18th May, 1838, and returned "no property," June 19th, 1838.

This evidence was objected to by defendant's counsel, and the objection overruled by the Court.

The evidence showed that at the time of the settlement, Reeves was considerably indebted. Holmes proved that he owed him \$184, and that he was also indebted to various persons in Macon. The record from Bibb Inferior Court showed that he owed Clayton \$350. Mrs. Reed proved that the girl Louisa was sold by the Sheriff in 1839, and that she was worth \$600. Clayton's mortgage *fi. fa.* in June, 1838, was returned, "no property." Asa Thompson proved that the boy Charles was sold in 1845 by the Sheriff of Houston county, under divers executions against Reeves. There was proof that Reeves owned about twenty negroes, a horse, buggy and piano; sixteen of which negroes were in the deed of settlement, and were valuable men and women, leaving him three or four negro children, the horse, buggy and piano, worth some \$1,400.

The evidence in the case is voluminous, but the above statement of it is deemed sufficient to a proper understanding of the points decided.

The motion for a new trial was overruled by the Court on all the grounds taken, and defendant excepted.

INGRAM & RUSSELL; JONES & JONES, for plaintiff in error.

DOUGHERTY, *contra*.

By the court.—LYON, J., delivering the opinion.

Interrogatories were exhibited to the plaintiff in error by the defendant, under the Act to authorize and compel discoveries at Common Law, December 17, 1847, to compel him to discover to whom he had hired the negro, and the amounts he had received for the negro. Clayton, in his answers,

a. Clayton vs. Brown.

stated what he considered the negro to be worth, and this part of the answers the plaintiff refused to read as evidence, and when the defendant offered to read it as evidence, plaintiff objected, and the Court sustained the objection. This is the first ground of error complained of.

1. The Act of 1847 enacts that these interrogatories may be sued out when pertinent, "and such as the adverse party would be bound to answer upon a Bill of Discovery in a Court of Chancery," and that the answers to such interrogatories "shall be evidence at the trial of the cause, in the same manner and to the same purpose and extent, and upon the same condition, in all respects, as if the same had been procured upon a bill in Chancery for discovery, but no further or otherwise." An answer to a bill in Chancery, for discovery, is evidence for the defendant, so far as it is responsive to the call in the bill for discovery or connected necessarily with the responsive matter, or explanatory of it." *Eastman vs. McAlpin*, 1 *Kelly*, 170. The answer of Clayton to the interrogatories could only be evidence for him when responsive to the call, according to the rule stated. It was not responsive—connected with the response—nor explanatory of it. It was, therefore, not evidence, and was properly ruled out.

2. The evidence of witness, Hart, the objection to which forms the second ground of complaint, was properly admitted. It was relevant to the issue, showed a conversion of the negro by Clayton, and could not be excluded by any rule that we know of, simply because the opposite party was willing to admit a conversion. The plaintiff was not bound to take his admission. The fact that the evidence placed the defendant in an unfavorable light before the Jury on the trial, does not alter the rule. To have avoided its consequences, he should not have been guilty of the wrong in the first place. Nothing can excuse one for a wrongful act or breach of faith, when the Courts are always open for his protection. Mr. Clayton was not ashamed to be guilty of both these, to get the advantage of his adversary; yet, when the matter comes to be investigated, he insists on the advantage thus acquired, but thinks it a great hardship that his conduct should be exposed and his title put in jeopardy in consequence. We cannot help him out of the dilemma.

3. We were not able to see the force of the objection to the transcript of the record of the mortgage debt from Reeve

to Clayton. The question before the Jury was, whether the deed from Reeves, under which Clayton claimed, was fraudulent against creditors? And for this purpose, the existence of debts against Reeves, at that time, was admissible. This was a debt against him at that time, and the transcript was proper evidence of it.

And this brings us to the only other point in the case, and that is, Was the verdict without evidence, or so strongly and decidedly against the evidence as to require us to order a new trial?

The evidence shows that Reeves, at the time of making this deed of settlement, was possessed of some twenty negroes, a horse and buggy, and a piano. He settles some sixteen of the negroes, all valuable men and women, on his wife and children, retaining out of the deed some four negroes, one of which was under mortgage at the time, and the three others were small children, and what became of them, the record does not show. Charles, the negro in controversy, was levied on and sold in 1845. One of the executions under which he was sold—and he was sold under divers—was on a debt that was in existence when the settlement was made. Reeves, at the time of the settlement, was otherwise indebted, and to various persons.

4. Now, it is settled that a father and a husband may make settlement on his wife and children, or on either, and the same will be protected against existing debts, provided it be a reasonable and fair one—one made in good faith, and not with an intent to defraud creditors, and the intent must govern. The settlement must not be of his whole estate and a valuable one, retaining but a pittance, and wholly insufficient to pay debts, as in this case. Such a settlement as this never was, and ought never to be, sustained against a creditor.

5. The intent to defraud creditors is too plain. But the question was an open one for the Jury. It was fairly submitted to them at least. There is no complaint as to the charge, and their verdict was against its *bona fides*, and that verdict, we think, was with the evidence, and it must stand.

Judgment affirmed.

FORMAN *et al.* vs. TROUP *et al.*

1. By the Will of the late Governor Troup, he directed that his executors keep his property together for three years, giving to the heirs in the meantime a decent and becoming support. "At the expiration of three years, and on the first day of January next thereafter, he desired that all of the property, of which he died possessed with, the increments both real and personal, be divided as nearly as possible into three equal shares. I mean specifically, one share for the children of Florida, one share for Oralie, and one share for George M. Troup, who are to have, and to hold the same to them respectively, their heirs and assigns forever with these exceptions, viz: if Oralie should die without legal lineal heir or heirs, then shall her share go to the children of Florida, to be equally divided among them, or the survivors; and if George should die without legal lineal heir or heirs, then shall his share descend to the children of Florida likewise, or the survivors." *Held*, that upon the death of George M. Troup, without legal lineal heir or heirs, the one-third share of his father's estate bequeathed to him, vested in the children of Florida, his sister.

Decision on demurrer at April Term, 1859, of Chatham Superior Court, by the Hon. WILLIAM B. FLEMING.

Mr. Justice LUMPKIN states the facts of the case in his opinion.

LOYD, JONES, JACKSON and WARD, for plaintiff in error.

LAW & BARTOW, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

I have no difficulty whatever in arriving at the conclusion that the devise over in this Will is good. Viewed either in the light of our own legislation, or by the technical rules of Westminster Hall, there is no legal obstacle in the way of the manifest intention of this testator.

According to the English Decisions this is not a limitation void under the rule against perpetuities. Let us examine it for a moment. The devise to the children named "who are to have and to hold the same to them respectively, their heirs and assigns forever," would give each a fee simple. But it does not stop there, the condition is annexed at once "~~with~~ these exceptions." And what is the exception? "If Oralie

should die without legal lineal heir or heirs, then shall her share go to the children of Florida, to be equally divided among them or the survivors; and if George should die without legal lineal heir or heirs, then shall his share descend to the children of Florida likewise, or the survivor." According to the English Courts this condition makes it manifest that the "lineal heirs" of these devisees are objects of the testators bounty, as well as Oralie and George, and that upon the *indefinite failure* of such lineal heirs, he desires the property to go over. To effect this double purpose, the English Courts curtail the fee-simple flowing from the words "heirs and assigns," and by implication give the first taker a fee-tail, the first being easily alienable to the defeat of the heirs, and the latter much more difficult of alienation. Thus the first intent in favor of the heirs is promoted. But if it was construed a fee-simple, the limitation over would be an executory devise, and as it is limited on an *indefinite failure* of issue, the limitation is too remote, and that intention is defeated. On the contrary, holding it an estate tail, the limitation becomes a *contingent remainder* upon the determination of the fee-tail, and is good. Thus both intents are carried out by curtailing the fee-simple to a fee-tail. It is true that the tenant in tail could defeat both by docking the entail, but if (as in this case,) he dies without doing so, the remainder over is good. For mark; when a grantor conveys an estate tail, he does not part with the entire fee. There remains in him a reversionary interest upon the happening of a certain event, viz: the failure of a tenant in tail. That may happen in the second or the fortieth generation, but whenever it does happen, the estate reverts, and no rule against perpetuity interferes. Well, this reversionary interest he may devise, and it then becomes a contingent remainder in the devisee. In the English Courts then, regardless of the superadded words, this limitation over would be held a valid remainder. *Doe ex dem Ellis vs. Ellis*, 9 East 382; *Lewis on Perpetuities*, 177, 178; 1 Jarm. 487, and authorities cited by them.

But the Statute of 1821 converts an estate tail in Georgia into a fee-simple. How affects it this question? Upon this Act of 1821, I would remark, that in the case of *Gray vs. Morrison*, 20 Ga., I dissented from my then associates on this Bench, because they sought by a literal construction of that Act to give to it an effect never enforced by the Courts,

Forman et al. vs. Troup et al.

and never dreamed of, in my judgment, by the Legislature. Now if we *adhere to the letter* of that Act, it converts into a fee-simple only an *express* estate tail. It has nothing to do with estates tail by *implication*, for they were not the creatures of the Statute *de donis*, but of the construction of the Court. If I was disposed thus to stick on the bark, I could dismiss the Act of 1821, as having nothing to do with this question. But such is not my view of this Act. I look upon it as one of a series of Statutes passed by our State, and indicating clearly her settled policy: First, that there shall be no entailments of estates in families, so as to prevent the free alienation thereof; and secondly, that avoiding this evil, the wishes of testators as to the disposition of their estates, should be fairly carried out, instead of being thwarted by technical rules, suggested by, and adopted for the benefit of English proprietors. This latter branch of State policy I conceive as culminating in the Act of 1854, (*pamp.* 72.) which swept away at one blow all the mass of legal lore on limitations and perpetuities, over whose ruins Chancellor Kent wept, as it fell before the ruthless invasion of the Revised Statutes of New York. Now, it would be a most remarkable consummation of the efforts of our legislators, if the Act of 1821 is to be invoked always to defeat, rather than to promote the wise purposes for which it was enacted; and it would be a sight equally as remarkable, if the Courts of this State held down the Act of 1854, to the phrases enumerated therein, regardless of the clearly expressed intention of the Legislature, to put an end to the murder of men's wills, by imputing to them an intention of violating a law which they respected, by creating an estate of which many of them never heard.

I should not attach much weight to these last words, if they stood alone; but taken in connection with the former words, they show, to my mind, clearly, that the testator was looking to a period within the lives of some of Mrs. Bryan's children then living, and no farther.

But a devise on failure of issue *within a life in being*, and 21 years, is good. (*Fearne on Rem.*, 468, *side page.*) It need not be at the death of the first taker.

But even if all this reasoning is bad, yet, our Act of 1854 seems to me conclusive: Look at it by the old rule of construction—the old Law—the mischief, and the remedy. The

old Law was, that a devise over on failure of issue should be construed an indefinite failure.

The mischief was, that by this technical, artificial, and unreasonable rule, men's intentions were continually frustrated and legatees deprived of what was justly theirs.

The remedy was, to cut up by the roots the rule referred to, as Parliament had done in 1838, and the Legislature used as broad words as they could to effect it. It is quibbling to say that "lineal heirs" is not an equivalent term to "issue." The mischief in both cases is the same, and the same remedy applies.

For myself, I shall never consent to such a construction of either the Act of 1821 or 1854. And of all men, never would I impute such an intention to violate the laws of his State to a man who loved her, and every letter of her laws, and every inch of her soil with an energy and devotion that no soul could inspire but that of George M. Troup.

There are in this Will several superadded words which, in my opinion, would of themselves relieve it of all difficulty, if difficulty existed. In *8th Georgia*, I announced that, for myself, the limitation to "survivors" would always rebut, in my mind, an indefinite failure of issue. In *Gray vs. Morrison*, 20 Ga., I adhered to that opinion, and dissented from a majority of the Court. I refer to that opinion for the reasons which subsequent reflection has only strengthened.

The provisions for an "equal division" of the estate among the surviving children of Florida, in this case, confirms the construction which makes the testator look to the failure of issue at the death of Oralie and George.

The demurrer should be sustained, and the bill dismissed.

Griggs vs. Daniel.

GRIGGS vs. DANIEL.

1. On a bill filed for the recovery of a negro, and the only evidence of title relied on by complainant was a deed from one Tinly, reciting on its face that he had conveyed said negro previously to another person: *Held*, That the plaintiff had no right to recover, and the bill was properly ordered to be dismissed.

Decision by Judge WORRILL, at Taylor Superior Court, at April Term, 1860.

The complainant, Sarah Jane Griggs, filed her bill in Taylor Superior Court, against John Daniel, whereby she alleged that she was the duly and legally qualified trustee of Nancy Griggs. The said complainant founded her claim to the property mentioned in the bill upon the following instrument in writing:

"GEORGIA, RICHMOND COUNTY:

"Whereas, about the year 1812, I, John Tinly, of the County and State aforesaid, executed a deed of gift to my daughter, Rebecca Daniel, formerly Tinly, and the heirs of her body, to a certain negro girl named Katy, about twelve years of age; which deed has been destroyed, and whereas I wish to secure to Nancy Griggs, formerly Tinly, the daughter of the said Rebecca, the said negro Katy and her increase, since the destruction of said deed: Now, this indenture, made and entered into this the 25th day of June, 1836, between John Tinly, of the county and State aforesaid, of the one part, and Thomas Griggs, of the county of Talbot, and State aforesaid, of the other part, witnesseth that I, the said John Tinly, for and in consideration of the love and affection which I have for my daughter, Nancy Griggs, and also for and in consideration of the sum of five dollars, to me in hand paid by Thomas Griggs, the husband of the said Nancy Griggs, the receipt of which I hereby acknowledge, have granted and sold unto the said Thomas Griggs, to and for the separate use of the said Nancy Griggs, and the heirs of her body, the said negro girl Katy and her child Rose, born since the making and execution of the deed mentioned in the first part of this instrument, to have and to hold the said

Griggs vs. Daniel.

negroes, Katy and Ross, together with their future increase, unto the said Thomas Griggs, his heirs and assigns forever, to and for the sole benefit and use of the said Nancy Griggs, and the heirs of her body, as aforesaid; and the said negroes are in no wise, and under no circumstances, to be subject to any debts of her husband, Thomas Griggs. And the said John Tinly do, by these presents, warrant and defend the said negroes unto the said Thomas Griggs, his executors and administrators in trust as aforesaid, against me and my heirs, and all and every person whatever.

"JOHN ^{his} ~~X~~ ^{mark.} TINLY.

"Signed, sealed and delivered in presence of

"GEO. M. WALKER,

"A. J. MILLER, N. P."

The Court, upon the hearing, dismissed the bill, upon the ground that complainant could not recover upon the deed mentioned in said bill. The complainant excepted, and assigns the same as error.

J. T. MAY, for plaintiff in error.

GRICE & WALLACE, *contra*.

By the Court.—LYON, J., delivering the opinion.

This was a bill filed for the recovery of a negro woman named Rose. Some reasons are given in the bill why resort was had to a Court of Equity, instead of prosecuting her rights at Law, which are not necessary to notice in this place. The whole title of the complainant to the negro, as set out in the bill, and on which a recovery depended, was a deed of gift made by John Tinly, the grand-father of complainant, on 25th June, 1836, in which John Tinly recites that he, about the year 1812, executed a deed of gift to his daughter, Rebecca Daniel, who was the mother of Sarah Jane Griggs, for whose benefit this bill is filed, and the heirs of her body, to a certain negro girl named Katy, about twelve years old. Which deed has been destroyed, and whereas I wish to secure to Nancy Griggs, formerly Tinly, the daughter of said Rebecca, the said negro girl Katy and her increase:

Griggs vs. Daniel.

Now, this indenture, made, &c. The deed then goes on regularly to convey said negro Katy and her child, Rose, to Thomas Griggs, in trust for Nancy Griggs. There is no allegation in the bill that the grantor had the possession of the negroes, or the right to convey them. The defendant answered the bill, and the parties went to trial. Upon the reading of the bill to the Jury, defendant moved to dismiss the bill on various grounds, among others, that there was no Equity in the bill. The Court sustained the motion, and as the parties were before the Jury, a verdict was taken in conformity to the decision of the Court. Complainant excepted to the rulings of the Court and decree of the Jury.

We think that the ruling of the Court, dismissing the bill for want of Equity, was right. The complainant showed no title whatever—no right to a recovery. The deed of gift from John Tinly, made in 1836, showed on its face, and was a part of the deed, that he, John Tinly, had no title to the negro Katy and her child Rose, but that, by deed of gift made in 1812, twenty-four years previously, he had parted with his title to the negro, to Rebecca Daniel. Therefore, he had no other title to convey to Mrs. Griggs. His title conveyed none, and Mrs. Griggs got none by that deed; hence, there was no Equity in the bill, and it was properly ordered to be dismissed.

The taking of a decree was certainly irregular, but that does not seem to have been done by the order of the Court, or against the objection of complainant. We can not review that, unless it was the act of the Court, which it does not appear to be.

Judgment affirmed.

EASTER vs. SNELLING.

1. A party has the right of appeal from a confession of judgment at Common Law, and a reservation of the right is unnecessary.

Tried before Judge KIDDOO, at June Term, of Webster Superior Court, 1859.

The opinion of the Court embodies the facts.

SAMUEL D. ELAM, for plaintiff in error.

By the Court.—LYON, J., delivering the opinion.

The plaintiff in error confessed a judgment to the defendant in error at Common Law, and entered an appeal from the same without having reserved the right in the confession. When the cause came on to be heard on the appeal, on motion, the Court dismissed the appeal, on the ground that no appeal could be taken from a confession of judgment, unless the right was reserved. In this we think there was error. The confession stands in place of a verdict—has that effect, and no other, and the appeal lies from it as well as from a verdict.

Judgment reversed.

KLINK, Administrator, vs. THE STEAMER CUSSETA AND OWNERS.

1. The order of the Judge of the Superior Court, (before whom the application and affidavit is made,) to the Clerk to issue execution for the sum sworn to with costs, in favor of the applicant against a Steamboat and owners, which order is signed by him officially, is a substantial compliance with the requirements of the Act of December 7th, 1841, "That the Judge or Justice shall grant an order to the Clerk to enter up judgment.
2. Had the proceedings been illegal on this account, they could have been cured by an order *nunc pro tunc*, so as to proceed at once with the trial, the rights of third persons not having intervened.

Statutory Proceeding to enforce Claim against Steamboat and Owners, in Muscogee Superior Court. Tried before Judge WORRILL, at November Term, 1859.

This was a proceeding under our Statute, (*Cobb's Dig.*, p. 427,) to enforce and collect a debt due by the owners of the Steamboat Cusseta, to John W. Freeman, for services rendered as Captain of said boat. Upon making the affidavit required by Law, Judge CRAWFORD ordered an execution to issue, which was levied upon the boat. One of the owners filed a counter-affidavit, denying the indebtedness, and the issue thereon came on for trial on the appeal in the Court.

The defendant moved to quash the *f. fa.* upon the ground that no judgment was rendered by the Judge before whom the affidavit was made. The Court granted the motion, and plaintiff excepted.

Plaintiff then moved to amend and enter judgment *nunc pro tunc*. The Court granted this motion, and defendant excepted.

The cause proceeded, and plaintiff was non-suited, to which he excepted.

JOHNSON & SLOAN, for plaintiff in error.

WILEY WILLIAMS, *contra*.

By the Court.—LYON, J., delivering the opinion.

John W. Freeman, the plaintiff's intestate, for the purpose of collecting a debt claimed to be due him by the owners of the Steamboat Cussetta, and enforcing the lien on said boat, given to him by Statute for such services, (*Cobb*, 427,) made application to the Honorable MARTIN J. CRAWFORD, then Judge of the Superior Court of that county—Muscookee—on the 24th February, 1864, and on that day made affidavit before him, in compliance with the terms of that Statute. Judge CRAWFORD, instead of granting an order to the Clerk of the Superior Court, to enter up judgment on said affidavit, in favor of said applicant, as required by the Statute, entered up and signed an order, directed to the Clerk, in which the affidavit was substantially recited, and execution ordered to issue in favor of applicant against the boat and its owners, for the amount sworn to be due, with the costs of proceeding, which order was signed by the Judge officially. Upon this order the Clerk issued execution, which was levied on the boat. One of the owners having filed a counter-affidavit and given a bond, as provided for in 3d section of that Act, the proceedings were returned to the Superior Court for trial of the issue between the parties. And on the trial of the cause, the presiding Judge held that the order of Judge CRAWFORD was not in compliance with the provisions of the Statute, and that the execution and levy were illegal. To this decision plaintiff excepted.

The Court, on application, granted an order to the Clerk to enter up judgment on the affidavit *nunc pro tunc*, and defendant excepted. Other points were made, but it is unnecessary to notice them, as our judgment on these two points will dispose of the others.

1. The object of the Statute, in requiring the Judge or Justice to grant an order to the Clerk to enter judgment on the affidavit, was, that the application should in that way show that it had received his sanction or approval. That order is the only judicial act required by the Statute to give these proceedings the force of a sentence or judgment.

The order of the Judge to the Clerk, to issue execution for a specific sum, with the costs, was equivalent to a judgment. It was his judicial sanction and approval of the application, and was a substantial compliance with the requirement of the Act. An order to the Clerk to enter up judgment could have done no more. A judgment entered up by the Clerk

Mayor and Council of the City of Columbus *vs.* Jaques *et al.*

would not have been more effectual. The Judge, instead of ordering the Clerk to enter judgment, has entered up the judgment himself. Hence, we think the Court erred in holding that the order was not a compliance with the Statute, and that the execution was void.

2. Had there been no order, or an insufficient one, we think it could have been remedied by an order *vacare pro tunc*, and when so remedied, the trial of the cause should have gone on between the parties as though the proceedings were regular from the commencement, when the rights of third persons had not intervened.

**MAYOR & COUNCIL OF THE CITY OF COLUMBUS
vs. JAKUES *et al.* MAYOR & COUNCIL OF THE
CITY OF COLUMBUS *et al.* *vs.* OLIVER, Solicitor-
General *ex rel.***

1. On a motion to dissolve an injunction, it is error in the Court to tax the defendant upon the refusal of such motion with the whole costs of the proceeding.
2. Any obstruction to a public street in a city, is a public nuisance.
3. A Court of Equity has jurisdiction, and will, in a proper case made by injunction, restrain a public nuisance.
4. The Legislature, 21st December, 1827, authorized certain commissioners to select a site and lay out an oblong square of 1,200 acres as a reservation for the common and town of Columbus, to lay out lots, with appropriate streets, alleys, squares, &c. On 19th December, 1828, the Legislature passed another Act, "That the Intendant and Commissioners shall in no wise have power to alter the plan of said City by shutting up streets or otherwise, nor to permit any dwelling-house or other buildings to be put on any of the streets or common of said town, under any lease or leases, or in any other way." *Held*, That the Mayor and Council of the City of Columbus, under this restriction, had no power to erect, or cause to be erected, a Market-house in the streets of said city.

In Equity, in Muscogee Superior Court. Decisions by Judge WORRILL.

These two cases, relating to the same subject-matter, and involving the same facts and legal questions, were argued and decided together.

The object of the bills—one filed by Jaques and others, the other by the Solicitor-General, *ex rel*—was to enjoin the City Council of Columbus from the erection of a new market-house, in the course of construction, in Oglethorpe street in said city.

Complainants, among other things, allege that they are citizens and tax-payers of the city of Columbus; that said city is largely indebted; that the Council have employed Goetchins & Hodges, contractors, to build a new market-house in said city at heavy cost; that the erection of said market is an obstruction in and to the streets of said city, and is a nuisance, and that the appropriation of money for said purpose violates the 7th section of the Act of 1845, which provides that no order or resolution for the payment of money, &c., exceeding three hundred dollars, except for the ordinary expenses of said city, shall have any force or effect, unless said order or resolution be passed by a majority of the whole Board at two successive meetings.

It was upon the ground of a violation of this provision of the Act of 1845 that Judge WORRILL granted the injunction in the first named case. To which order, counsel for defendants excepted.

In the second named case, after argument, he granted the injunction, and counsel for defendants excepted, and assigned for error—

- 1st. That the Court had no jurisdiction.
- 2d. That the Solicitor-General has no power or authority to file said bill.
- 3d. That the injunction was improperly granted.

JOHN PEABODY, JOHNSON & SLOAN, for plaintiffs in error.

B. A. THORNTON, W. WILLIAMS, BLANDFORD, *contra*.

By the Court.—LYON, J., delivering the opinion.

Two bills were filed against the Mayor and City Council of Columbus.

One by the Solicitor-General, for the State of Georgia, on the information of a large number of the citizens and tax-payers of the city of Columbus, to enjoin the Mayor and City Council from the erection of a large building for a market-house, with a hall above, to be let for concerts and exhibitions, which they (the City Council) had contracted for, and contemplated erecting in the centre of Oglethorpe street; which is alleged to be one of the most public thoroughfares and commonly used streets in the city, and that such intended building was an obstruction thereof, in violation of the charter of said city, and of the rights of the citizens of said city, and of the citizens of the State of Georgia, to the free and uninterrupted use thereof, for trade, travel, &c., as a public highway. The Court, on a hearing, sanctioned the application, and ordered an injunction to issue. To this decision the Mayor and City Council excepted.

The other bill was filed by the complainants therein, as citizens and tax-payers of the city, alleging the additional ground, that the contract for the erection of said building was void, and ought not to be enforced as against the tax-payers, because it was in violation of 7th section of an Act of 1845, that provides, that no order or resolution for the payment of money exceeding \$300, except for the ordinary expenses of said city, shall have any force or effect, unless said order or resolution be passed by a majority of the whole Board of the City Council of said city at two successive meetings thereof. The bill alleged that the contract had not been passed by two successive meetings, as required by the Act. This injunction was allowed by the Court, and upon an application to dissolve, the motion was not only refused, but the Mayor and City Council ordered to pay the costs of the whole of the proceeding. This judgment was also excepted to. Subsequently, or perhaps at the same time, the injunction was so far modified as to allow the defendants to go on with their contract or make a new one, provided such contract should subsequently be passed upon and approved by a majority of the whole Board at two successive meetings, in terms of the Act. It is conceded the City Council has subsequently complied with the Law, and the injunction, in consequence, has ceased to be effective.

The only practical question for our consideration, therefore, is that of the judgment of the Court taxing the defendants in the bill with costs and directing execution to be issued and levied for that purpose.

1. In this there was error. The costs in that behalf, as in all other cases, must abide the result of the final trial of the cause, and so that judgment must be reversed on that ground.

Was the Court right in granting the injunction on the bill filed by the Solicitor-General on the information of the citizens and tax-payers, on the grounds therein alleged?

To understand fully the force of this application, it is necessary to advert to the charter of the City of Columbus, and various additional amendments thereto, by different Acts of the Legislature, in which the lands on which the city is built was granted to the city, and the powers conferred therein—first in Commissioners, and subsequently in the Mayor and City Council. The first Act on the subject was passed on the 24th December, 1827, of which the following is a copy:

AN ACT,

To lay out a trading town, and to dispose of all the lands reserved for the use of the State near the Coweta Falls on the Chattahoochee River, and to name the same.—[Assented to Dec. 24, 1827, *Daw. Comp.* 470.]

[1.] 1. *Be it enacted, &c.* That His Excellency the Governor shall, immediately after the passage of this Act, appoint five Commissioners to select the most eligible site, and cause to be laid out and distinctly marked on the reserve aforesaid a town, upon such plan as they may devise and approve, having special regard to the future commercial prosperity of said town and the health of its inhabitants.

[2.] SEC. 2. That said Commissioners, in the execution of the duties by this Act assigned them, shall lay out a square or an oblong square fronting the Chattahoochee River of twelve hundred acres, as a reservation for the common and town of Columbus, within which square they shall lay out not less than five hundred building lots of half an acre each, with an appropriate number of streets, alleys, and a suitable number of reserved squares for public buildings, &c.; secondly, one square within the town and common reserve of

Mayor and Council of the City of Columbus vs. Jaques et al.

ten acres shall be laid out and appropriated to and for the use of the county of Muscogee, as a site for their public buildings, with the privilege of selling so much of the said ten acres as the commissioners of the court-house and jail of said county may deem proper to aid them in building a court-house and jail; but in the event of the commissioners of the court-house and jail selecting some other site than the town of Columbus for their public buildings, then and in that case the aforesaid lot of ten acres shall revert to, and become again vested in the State.

[8.] SEC. 10. That the said town shall be called and known by the name of Columbus.

Under this Act, it seems that the Commissioners therein named laid off the city of Columbus into streets, lots, squares, &c., as they were authorized to do, and as they exist at this day. On the 19th December, 1828, the Legislature passed another Act, of which the following is a copy :

AN ACT,

To incorporate the town of Columbus, in the county of Muscogee, and to provide for the election of an Intendant and Commissioners for the same. [Assented to 19th Dec., 1828, Daw. Comp. 474.]

[4.] SEC. 3. *And be it further enacted, &c.* That the Intendant and Commissioners shall in no wise have power to alter the plan of said town by shutting up streets or otherwise, nor to permit any dwelling-house or other buildings to be put on any of the streets or common of said town under any lease or leases, or in any other way.

[5.] SEC. 4. That the Intendant and Commissioners of said town shall have power to lease the common and other property of the town for any term not exceeding three years at any one time.

[6.] SEC. 5. That the Intendant and Commissioners shall have power to pull down and destroy, as a nuisance, all obstructions in the streets of said town, and all dwelling and other houses on the common and unsold lots within the corporate limits of said town, which shall embrace the town and common belonging thereto.

On the 21st December, 1831, the Legislature, by Act, authorized the Intendant and Commissioners of Columbus, and their successors in office, "to lay off and lease any lots in said town, below Thomas street, for the purpose of building wharves only, for any number of years, as they may think proper, not exceeding twenty, for the use and benefit of said town." By an Act of 23d December, 1835, "The election of a Mayor, in lieu of the Intendant and six members, (which number, by an Act of December 25th, 1845, was increased to twelve Aldermen,) of the City Council, to be known as the Mayor and Council of the city of Columbus," with power, by sec. 12, "to pass all by-laws necessary for the government of said town which do not conflict with the Constitution and Laws of the State of Georgia, and of the United States, reference to which alone shall be had in the adjudications upon this Act." By an Act of December 25th, 1837, "The Mayor and Councilmen of the city of Columbus are authorized to lease all of the south commons, or so much thereof as may be necessary for the purpose for which they are now used, for the term of twenty years, at such rates as they may deem necessary to the interest of said city of Columbus." Again, in December 22d, 1840, "the Mayor and Council of the city of Columbus may, and thereby were authorized to define Bay street in said city, and to limit its width to one hundred feet; and to lay off water lots up and along the western boundary line of said street, and on the north common of said city, beginning," &c.; and by the second section, "to dispose of said water lots by lease or sale for such time and on such terms as they may deem best for the interest of said city, and to execute titles to the same."

These are all the different enactments, or legislative provisions, on the subject to which our attention has been directed, or which we deem necessary to notice.

The questions that present themselves to our consideration are—

1. Whether the facts constitute a public nuisance?
2. Whether injunction is a proper remedy, or whether it will lie in such case?
3. Whether the City Council of Columbus have, by their charter and subsequent legislation, such control over the streets as enable them to erect the building for the purposes contemplated?

Mayor and Council of the City of Columbus vs. Jaques et al.

The nuisance here complained of is of a particular kind, termed, in the books, a *purpresture*, which signifies, a close, or enclosure; that is, when one encroacheth and makes that serviceable to himself which belongs to many. "And because it is properly, when there is a house builded or an inclosure made of any part of the King's demesne, or of a highway, or a common street, or public water, or such like things, it is derived of the French word *pourpris*, which signifies an inclosure; but specially applied, as is aforesaid, by the Common Law." *Coke on Lit.*, 3 Vol., 4 *Waterman's; Eden on Inj.*, 259. "There is no doubt but that all injuries, whatsoever, to a highway, as by digging a ditch or making a hedge across it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the King's subjects, are public nuisances at Common Law." 1 *Russ. on Cr.*, 346. "Any contracting or narrowing of the highway is a nuisance. *Ibid.*, 849. It is said that notwithstanding the erection of this building, the public will not be inconvenienced, for there will be sufficient space on either side of the building for the passage of the public. The answer to this is, that the public have the right to the unobstructed use of the whole street, just as it was wont to run, or as it has been dedicated to its use. In other words, to apply the principle to this case, the public has the right to the use of this entire street just as it was laid off by the commissioners under the Act of 1827, and any obstruction or encroachment on the same is a nuisance.

8. The next question is, whether Equity has jurisdiction or can afford relief by injunction? It is claimed that no such jurisdiction exists, because the remedy at Common Law is adequate and complete by indictment, &c. The authorities leave us no room to doubt, but that Equity has jurisdiction, and can, by injunction, give relief. If there was any doubt as to whether the Act complained of was a nuisance, we would not, in a case of the importance of this, interfere by injunction; but there is no doubt of that fact; it is a plain fact—is admitted by the answer. We are aware that Chancellor KENT, in the *Att'y Gen'l vs. The Utica Insurance Co.*, 2 *Johnson's Ch.*, 370, refused an injunction against certain persons for carrying on the business of banking in violation of an Act of the State of New York; and in that case, while he admitted that there was a precedent for equi-

table interference in cases of this kind, he very gravely doubted whether the Court properly had the jurisdiction. But *Eden on Injunc.*, 289, lays down the rule broadly, "that the remedy for this species of injury, is by information of intrusion at Common Law, or by information at the suit of the Attorney-General in Equity." *Att'y Gen'l vs. Richards*, 2 Aus., 603; *The Mayor of London vs. Bolt*, 5 Ves., 129. The ground of this jurisdiction of Courts of Equity, in cases of *purpresture*, as well as of public nuisance, undoubtedly is, their ability to give a more complete and perfect remedy, than is attainable at Law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations. *Story's Equity*, §924; see also §§921, 2, 3, 5. In addition to the reasons stated by Judge STORY, in §924, why the remedy at Common Law by indictment would not be complete in this particular case, I will state here one or two other reasons: This indictment would necessarily be against the city officers, or those who act under them, and in all probability the influence and moral integrity of these gentlemen, which would necessarily be brought to bear against a criminal proceeding, would more than likely protect them from a conviction as criminals. Besides, if the nuisance be erected and they should have to be abated as such, the whole loss would fall on the tax-payers of the corporation, and therefore the interference of a Court of Equity is in the highest degree necessary to prevent this outlay and loss of the money in which all have a common interest. This identical question was before the Supreme Court of Alabama, in the *State vs. The Mayor and Aldermen of Mobile*, 5 Porter, 279. That was a proceeding like this, to restrain the Mayor and Aldermen of the city of Mobile from the erection of an extensive market-house in Government street, which would hinder and obstruct its free and uninterrupted passage. By a Statute of the State of Alabama, passed in 1820, supplementary to the Act, to incorporate the city of Mobile, authorizing the corporation "to widen, extend and regulate the streets, lanes and alleys in said city, &c. And provided, moreover, that the street known as Government street shall, and the same is hereby declared to be one hundred feet wide." "This," the Court says, "is equivalent to a declaration, that it shall remain open of that width, notwithstanding any act to be done by the corporation." "The corporation is vested

with power to regulate the streets, &c., of the city, under certain restrictions, one of which is, that Government street shall be one hundred feet wide. The Legislature have withheld the right from the corporation to regulate that street, in disregard of this restriction. Any act, then, done by the corporate body which contracts its limitations must be invalid, as a usurpation of authority." The legislative declaration, prescribing the dimensions of a street, excludes the action of the corporate body, so far as it comes in conflict with the paramount will of the Legislature, and must in itself be taken to make it a highway, free to the passage of all persons, for all legitimate purposes. "Touching the jurisdiction of Equity in case of nuisance, though the cases in which it is exercised are not frequent, yet, we think it undoubted." If this legislative provision was so restrictive upon the power of the corporation of Mobile to interfere with, obstruct or impede the free and uninterrupted use of Government street, as a public highway, how much more so is the legislative restrictions of the Act of 19th December, 1828, upon the City Council of the city of Columbus: "That the Intendant and Commissioners shall in no wise have power to alter the plan of said town, by shutting up streets or otherwise, nor to permit any dwelling-house or other building to be put upon any of the streets or commons of said town under any lease or any other way."

4. And this brings me to the consideration of the last question, and that is, Whether the City Council of Columbus, under the general grant to pass such by-laws as are necessary for the government of said city, or from some other Acts to which I have referred, do not take the power either directly or by implication to regulate and control the streets of the city as they think proper? And we are clear that they have no such power—no power to obstruct the streets of said city by the erection of any building, no matter how essential and important they may deem the erection of such building for the benefit and welfare of the city or its citizens. Upon this subject there is no room left for them to judge. The legislative prohibition is too plain and unqualified. The Act of 26th December, 1881, to lay off and lease lots in the town below Thomas street, for wharves; that of 25th December, 1837, authorizing a lease of the South commons, and that of 22d December, 1840, authorizing the City Council to define

Rogers vs. Mariner et al.

treet and to limit its width to one hundred feet, all together or singly, instead of showing that the City might exercise such power, plainly negative any such

If the City Council had the power, why these Acts? holding with the Court below, that the erection of this building would be such a public nuisance as a Court may will and ought to relieve against, and that the act of usurpation of power by the City Council expressly prohibited by the second Act of the Legislature which I have mentioned, we are compelled to affirm the judgment.

ROGERS vs. MARINER *et al.*

gave bond to R. in the sum of \$250, conditioned, that if M. and his wife should take possession of a lot in the city of Columbus, on 25th December, on demand to R., provided R. shall, on like demand, at the same time deliver possession to M. and wife of another lot. On suit to enforce payment, the plaintiff failed to show on the trial the quantity of interest intended to be divided between the two in respect to the lot: *Held*, That the Court properly rendered a non-suit.

Obt on Bond, from Muscogee County. Decision by Judge WORRILL, November Term, 1859.

The plaintiff in error brought an action against defendants to recover damages for an alleged breach of a bond given him by them, the condition of which is as follows:

The condition of this obligation is such, that if said Mariner and his wife shall, on the 25th day of December next, hereafter, on demand, deliver to said Rogers, or his or her possession of the north half of the lot in the city of Columbus, in said county, and distinguished in the plan of the city as lot No. 137, with the present improvements

Rogers vs. Mariner et al.

thereon, provided said Rogers shall, upon a similar demand at the same time, deliver possession to said Mariner or wife of that parcel of ground lying in said county, in the Coweta Reserve, and known as the south-east quarter of the one hundred acre lot, No. 114 in said Reserve containing twenty-five acres, then this bond to be void, else to remain in full force and virtue."

Plaintiff, on the trial, put this bond in evidence. He then proved that plaintiff at several times offered to make the exchange of lots, tendering his own to defendant, Mariner and his wife, and demanding theirs from them; and that they failed and refused to make the exchange. He also proved that defendant's lot was worth \$200 more than plaintiff's; that plaintiff had incurred expense and damage of several hundred dollars by having to move his family about; rent, &c., by reason of defendant's refusal to make the exchange. After the bond was executed, plaintiff moved to town from his lot, expecting Mariner to take it. Mariner plowed a portion of this twenty-five acre lot; did not move on it; it was damaged by not being taken care of afterwards; Mariner disclaimed owning the lot he had agreed to exchange.

The plaintiff having rested his case with this testimony, counsel for defendants then moved a non-suit, and the motion was sustained by the Court. Afterwards, counsel for plaintiff moved a rule for a new trial, on the ground that the Court erred in granting said non-suit.

The Court refused the rule, and counsel for plaintiff excepted.

INGRAM & CRAWFORD, for plaintiff in error.

HOLT & HUTCHINS, *contra*.

By the Court.—LYON, J., delivering the opinion.

When this case was before this Court on a former occasion. 26 *Ga.*, 320, a new trial was ordered because of error in the Court's refusing to admit evidence to show that the estate intended to pass with the possession was one in fee; and further, that "the measure of damages depends on the quantity of interest which was to be interchanged with the possession." The evidence had on the present trial leaves the case in more

uncertainty and doubt than ever. The evidence wholly fails to show the quantity of interest which was intended to be interchanged. The witness says they were to make an even exchange, but of what interest in the lots, does not appear; and as the plaintiff failed to show that, so that the damages might be measured, the Court did right to award a non-suit.

Judgment affirmed.

THE MAYOR & COUNCIL OF THE CITY OF COLUMBUS *vs*. ARNOLD.

1. One cannot be tried and convicted for an offense different from that for which he is prosecuted or called upon to answer.

Certiorari, in Muscogee Superior Court. Decision by Judge WORRILL, at November Term, 1859.

This was a certiorari sued out by John D. Arnold, against the Mayor of the City of Columbus, to reverse and set aside an order or sentence imposing a fine of ten dollars on plaintiff for exposing to sale and selling meats in said city outside of the Market, contrary to the ordinances thereof. The summons was to appear and show cause why he should not be fined for a "violation of the 44th section of the City Ordinances in refusing to pay the fees and for exposing his meat for sale by 6 o'clock, A. M., in said city." Upon the trial, so much of the charge or accusation as related to exposing meat for sale, &c., was dismissed by the Mayor, and the case continued. Afterwards, at a subsequent Term or meeting of the Mayor's Court, the case was taken up for a final disposition or trial, when plaintiff moved to dismiss the same, on the ground that said 44th section had been super-

Mayor and Council of the City of Columbus vs. Arnold.

ceded and annulled prior to the commission of the alleged offence. The motion to dismiss was refused, and this constitutes the first ground of exception and application for certiorari. The case proceeded, and after hearing evidence, the Mayor imposed a fine of ten dollars on plaintiff in certiorari for a violation of an ordinance passed in June, 1858, laying and imposing a tax of 25 cents on every quarter of beef, and 10 cents on every quarter of mutton, kid, lamb, pork and venison sold at any other place within the corporate limits of the city than at the Market-house.

To which sentence and judgment Arnold excepted, and thereupon sued out his certiorari.

The presiding Judge of the Superior Court before whom the certiorari was heard, sustained the same, and ordered the sentence of the Mayor to be reversed and set aside, on the ground that it was illegal and without authority of Law. To which decision counsel for the Mayor excepted.

JOHN PEABODY, for plaintiff in error.

L. T. DOWNING, *contra*.

By the Court.—LYON, J., delivering the opinion.

The defendant in error was summoned to appear before the Mayor and City Council of the city of Columbus, to answer to a charge of the violation of the 44th section of the City Ordinances, in refusing to pay the fees and exposing his meat for sale by 6 o'clock, A. M., in said city. On the hearing before the Mayor, the defendant was adjudged guilty, and fined for exposing to sale and selling meats in said city outside of the Market. This judgment was carried to the Superior Court by certiorari for review, and the judgment of the Mayor was overruled on the hearing before Judge WORRILL, and this latter judgment was brought before us by bill of exceptions. Upon consideration, we affirm his judgment. The ordinance on which the defendant was adjudged to be guilty, was passed long subsequently to the one under which defendant was prosecuted, besides the offence for which he was fined, was a totally different one from the one which he was called upon to answer; and hence, the judgment was necessarily wrong.

Judgment affirmed.

COOK vs. WALKER.

1. To authorize a recovery for malicious prosecution in a civil proceeding, the plaintiff must show affirmatively that the proceedings were malicious and without probable cause, both concurring.

Case, in Harris Superior Court. Tried before Judge WOBBLILL, April Term, 1860.

This was an action on the case brought by Elijah Cook, against Thacker V. Walker, to recover damages alleged to have been sustained by plaintiff, by the suing out a writ of *ne exeat*, and seizing upon about 80 negroes of plaintiff's, having a receiver appointed, &c.

Plaintiff opened his case and offered in evidence the bill, and proceedings in the Equity case, in which the *ne exeat* issued. Also, the *ne exeat* bond executed by plaintiff, with Mary Walker as security, and the Record of the Court of Ordinary, appointing him administrator on the estate of said Mary Cook, deceased, his wife, and his bond as administrator, with said Mary Walker thereto.

Plaintiff further, amongst other things, offered to prove the value of the estate of Mary Walker, his security, on his *ne exeat* and administration bonds. This testimony the Court refused, and counsel for plaintiff excepted.

Plaintiff having closed, counsel for defendant moved for a non-suit, which the Court below granted, and counsel for plaintiff excepted.

JONES & JONES; J. N. RAMSEY, for plaintiff in error.

WM. DOUGHERTY, *contra*.

By the Court.—LYON, J., delivering the opinion.

This was an action for malicious prosecution by the plaintiff against the defendant, on the following state of facts: The plaintiff married a sister of the defendant, who was possessed of a large estate. On their marriage, they entered into a marriage contract, in which Mrs. Cook's property was conveyed to one of her brothers, in trust, for her sole use,

"with liberty," to the wife, "to sell and dispose of, and to give away, either by deed, will or otherwise, all or any part of the same as she may think proper; but in case she should die without children, or without making disposition of the property at her death, the property was to be divided among her mother, brothers and sisters." Mrs. Cook died subsequently, without children, and without making any disposition of her estate. The defendant administered on her estate and gave his mother-in-law as security on his administration bond, and claimed that his wife's estate belonged to him under the Law of Distribution. The brothers and sisters and the descendants of such of them as were deceased, filed their bill in Equity in Harris Superior Court against Cook for discovery and distribution, and in that bill prayed a writ of *ne exeat* against Cook. This bill was sanctioned by Judge IVERSON, the then Judge of the Superior Court of that county, and the writ of *ne exeat* issued. Cook was arrested under the same, and gave bond, with Mary Walker, his mother-in-law, and the mother of the complainants, as his security, she having favored Cook in the contest for his wife's property. The surety was possessed of a large estate in her own right, and but for her relationship to the parties, would have been ample security on the bond. She was quite old, and the complainants, naturally expecting that the property she was possessed of would ultimately, and in the course of things, belong to them as her heirs at Law, could not see how this gave them any security for the forthcoming of the property in litigation, for if the loss fell on the surety, it would have to be made good out of an estate that they very reasonably expected would be their own, and that thus they were indirectly sureties themselves for Cook. Under these circumstances and facts, complainants filed a supplemental bill, asking the Chancellor to compel Cook to give other security, which the Court, upon the hearing thereof, allowed.

To the bill so filed for distribution, the defendant therein by counsel, demurred, and upon the hearing of that demurrer, the presiding Judge of the Superior Court overruled the demurrer, and ordered the defendant to answer. That decision was excepted to, and brought to this Court, and at the hearing, this Court sustained the demurrer, holding that under the unlimited power of disposition given the wife

Cook vs. Walker.

the marriage settlement, the absolute fee was vested in her, and the limitation over was, in consequence, not good, and that on her death, the property vested in her husband *jure marite*. This is the whole ground of the accusation. On the trial, the proof was, that the property had been taken possession of by the Sheriff under the *re exeat* and kept some thirty or forty days; that some of the property had been sold and brought fair prices; that the services of the negroes were worth \$800 or \$1,000 during the time; that the fees and commissions allowed to the receiver from sale and attention to the property amounted to some \$500 or \$600; that the counsel fees paid out by Cook in that litigation must have been some \$6,000 or \$7,000—at least it was worth so much—and by William Dougherty, one of the counsel for the complainants in the bill, that he had been practicing Law some twenty-seven years, and that he had advised the complainants that the property was theirs, and all the proceedings that were taken. The plaintiff offered to put in evidence his administration bond on his late wife's estate, with Mary Walker as surety on same, and the value of her estate, for the purpose of showing, I suppose, that the complainants were amply protected by that bond, in case there had been a recovery in their favor, and that the writ of *re exeat* applied for and sued out in the cause was unnecessary. The Court excluded the evidence. The plaintiff having then closed the evidence, on motion of defendant's counsel, the Court awarded a non-suit. That is the case.

To sustain this action, the plaintiff must show affirmatively that the prosecution complained of was malicious and without probable cause, both concurring. This is the very ground-work, without which there is no cause of action. *Farmer vs. Darling*, 4 Burr., 1,975; *Graham vs. Bell*, 1 Not. & Md., 288; 2 Gr. Ev., 449. It is not a sufficient proof of probable cause, that the plaintiff was acquitted of an indictment by reason of the non-appearance of the defendant, who was the prosecutor. *Purcell vs. Macnamard*, 9 East. 361; nor that the Grand Jury returned the bill not found. *Byrne vs. Moore*, 4 Titunt., 189. In that case Lord Mansfield said: "If this action could be maintained, every bill which the Grand Jury threw out would be the ground of an action." The fact that the goods were not stolen, but accidentally mislaid, will not alone establish the want of probable cause.

Cook vs. Walker.

Swain vs. Stafford, 4 Iredell, 362. Probable cause does not depend on the actual state of the case, in point of fact, but on the honest and reasonable belief of the party prosecuting. 4 Iredell, 398; 2 Gr. Ev., 455; *Johnstone vs. Sutton*, T. R. 510, is a leading case in actions of this kind. Johnstone, who was commander of a squadron of ships and vessels of war, ordered Sutton, who was a Post Captain of one of the vessels forming the squadron, into custody for alleged disobedience of orders, and after detaining him in long confinement with attending circumstances of great cruelty, brought him to a Court-Martial, in which Sutton was honorably acquitted of the charge, in this wise: "From the circumstances proved of the condition the Lais (whereof Sutton was commander,) was in, it appeared to the Court-Martial, that the plaintiff was justifiable, &c." Upon action brought for the malicious prosecution and a recovery had, on motion to arrest judgment, the Exchequer Court held that the action was maintainable. The cause being carried to the Exchequer Chamber, was heard before Lords MANSFIELD and LOUGHBOROUGH, who held, after much argument, that the judgment of the Exchequer Court should be reversed; that the action was not maintainable, because it appeared on the face of the sentence, that there had been, in fact, a disobedience of orders, and although justifiable still, it afforded probable cause, and the decision was put on the authority of a case reported in 1 Wils., 232, *Reynolds vs. Kennedy*; that was an action for maliciously and without probable cause, prosecuting for condemnation, brandy seized as forfeited. The brandy was condemned by the sub-Commissioners, but the condemnation was most rightfully reversed, on appeal to the Commissioners, and because of that condemnation by the sub-Commissioners, the action would not lie for the reason as stated by Ch. J. LEE, that malice could not be inferred but as was more correctly stated by Baron EYRE, that from the condemnation, probable cause would be inferred."

If the facts and circumstances show that in the prosecution the party was actuated by an honest and reasonable conviction of the justice of his suit, and not merely with a view to occasion expense to his adversary, the action will not lie. Now, upon the reason and principle of these authorities, this action cannot be maintained. Who can doubt but that the defendant, in the prosecution of the suit for the recovery of

Dozier vs. Dozier.

the property, was actuated by an honest conviction that he was entitled to the property? He was so advised by his counsel; it was so held by the presiding Judge of the Superior Court in which the case was tried. The whole record shows that there was probable cause. No writ or process was sued out in the cause but such as was advised by counsel and sanctioned by the Court, on a statement of facts that was not controverted. If we were to hold that this action would lie, it would be on the principle that every suitor who happens to be cast in his suit is liable to the action, for every process sued out by him during the progress of the suit for the protection of his interest, that is authorized by law, advised by counsel and sanctioned by the Court, no matter with what good faith and honest conviction the suit was prosecuted. Such ruling would be unsanctioned by and against all precedent and every principle of Justice.

Judgment affirmed.

DOZIER vs. DOZIER.

1. When the plaintiff's affidavit, under the Act of Dec. 11, 1858, preliminary to suing out a *ca. sa.* against the defendant, states that the defendant "has money," &c.: *Held*, That to be a sufficient description of the property to authorize a *ca. sa.* to issue.

Ca. Sa., in Marion Superior Court. Decision by Judge WORBILL, March Term, 1860.

Thomas Dozier, sen., having obtained a judgment against Thomas H. Dozier, and desirous of issuing a *capias ad satisfaciendum* against him, made affidavit under the Act of Dec. 11, 1858, "that he has just cause to believe that the defend-

Doster vs. Doster.

ant, the said Thomas H. Doster, has money which he cannot reach by *feri facias*. Upon this affidavit a *ca. sa.* issued, and defendant was arrested. At the Term to which the *ca. sa.* was returnable, plaintiff moved to enter judgment on the *ca. sa.* bond, upon the ground that no schedule of defendant's property had been filed, and that he did not appear in Court.

To this order counsel for defendant objected, and moved to dismiss the *ca. sa.* and proceedings thereon, upon the ground that the affidavit was insufficient and defective, and did not authorize the issuing of the *ca. sa.*, because no amount of money is therein specified as belonging to, or in possession of defendant.

The Court sustained the motion and dismissed the *ca. sa.*, and counsel for plaintiff excepted.

INGRAM & RUSSELL, for plaintiff in error.

BLANDFORD & CRAWFORD, *contra*.

By the Court.—LYON, J. delivering the opinion.

Was the affidavit made and filed by the plaintiff, preliminary to suing out the *ca. sa.*, sufficient to authorize the issuing of that writ?

The Act of the Legislature of Dec. 11, 1858, requiring this affidavit, is in these words:

"SEC. 1. *Be it enacted*, That from and after the passage of this Act, no *capias ad satisfaciendum* shall issue against the body of any defendant, from any Court of this State, until the plaintiff, his agent or attorney, shall have first filed an affidavit in the Clerk's office of the Court in which judgment has been obtained, or with the Justice of the Peace, by whom the same may have been rendered, stating that he has just cause to believe that the defendant has money or property which cannot be reached by the *feri facias*, other than such as is allowed by Law, or that the defendant has property which is beyond the jurisdiction of the Court in which said judgment has been rendered. The affidavit must state of what the property consists, particularly describing the same."

The affidavit filed in this case recites that the defendant "has money which cannot be reached by *feri facias*. This

is the only property or description given. We think the description sufficiently full and certain to authorize the writ to issue. The description is in the words of the Statute. If the affidavit was required to state what kind of money it was that defendant had, it would be equivalent to saying that a *ca. sa.* could not issue on that ground, no matter how much money the defendant was possessed of. For although one may see and know that another has money, yet, it would be very difficult to tell what kind of money it was, unless a closer inspection was allowed than is customary or usual with one who is concealing from a creditor. But a description that it was of a particular kind of money, would not mend the matter; for whether on one bank or another, it is still money. If it be said that the proper description would be to state the amount, we reply, that the Statute does not require that to be done. The affidavit is in the words of the Statute, and where that is so, we will not require more to be done, especially when to require more would be to deny the right.

Judgment reversed.

FOX vs. RUCKER.

1. A plasterer is not entitled to the lien for his work, materials furnished, &c., given to masons and carpenters by the Act of 22d Dec., 1834, and made general by the Act of December, 1838.

Complaint, in Taylor Superior Court. Tried before Judge WORRILL, at November Term, 1859.

Fox was employed by Rucker to lath and plaster a house. After the work was done, the parties came to a settlement,

Fox *vs.* Rucker.

and after deducting payments made, Rucker fell in debt to Fox \$256 35, for which he gave his note, specifying therein that the amount was due Fox for plastering. Fox recorded a lien on the house and lot on which it stood, and afterwards brought suit for the purpose of enforcing the lien. It was proved on the trial that the work for which the note was given, was done by Fox and a man named Hilton, hired by Fox to assist him, and that Hilton was an excellent brick-mason, but that Fox was a plasterer only, and had no skill in brick-laying. It was further proved that lathing and plastering a house is no part of the work of a brick-mason or carpenter.

The Court charged the Jury, in substance, that the plaintiff was not entitled to a lien on the house and lot, if they believed that lathing and plastering is, by the custom of mechanics, the work of a plasterer, and not the work of a carpenter; that in no event could he have a lien for the plastering; but if the Jury believed lathing was, by the custom of mechanics, a part of the work of a carpenter, they might enforce the lien for the value of the lathing.

The Jury returned a verdict for the amount of plaintiff's demand, but found that he was not entitled to any lien on the house and lot. Whereupon, counsel for plaintiff filed their bill of exceptions, alleging that the charge of the Court is erroneous.

GRICE & WALLACE, and D. W. MILLER, for plaintiff in error.

MARK H. BLANDFORD and W. P. EDWARDS, *contra*.

By the Court.—LYON, J., delivering the opinion.

The only question in this case is this: Whether a plasterer is entitled to the benefit of the provisions of "An Act to give masons and carpenters an incumbrance for debts due on account of work done and materials furnished, &c.," of Dec. 22d, 1834, and made general by Act of Dec. 28, 1838? The first section of that Act provides, that "All debts which may hereafter become due to any mason or carpenter in the counties of Richmond, &c., for work done, or materials furnished for building or repairing any house, in all cases, when said mason or carpenter shall not have taken personal security for

said debts, shall constitute and be an incumbrance on such house and the premises to which it shall be attached, superior in dignity and of higher claim than any other incumbrance whatever, no matter of what nature or sort the same may be, and without regard to the date of such other incumbrance." *Cobb*, 555.

It was in proof that a plasterer is neither a mason or carpenter, but that his trade is a distinct one from either. A mason is one whose occupation is to lay bricks and stones, or to construct the walls of buildings, chimneys and the like, which consists of bricks and stones.

A carpenter is one who works in timber—a framer and builder of houses.

A plasterer is one that overlays with plaster; and these definitions, taken from Webster, are the usual and ordinary significations of the terms. It is clear, then, that the plasterer is not within the letter of the Law. Is he within the intention, and if so, can the Court, by construction, extend the operation of the Act to him?

It is said in the argument for the plaintiff, that the plasterer is in the Equity of the Statute; that is, the same reasons that induced the Legislature to pass this law, for the benefit of the mason and carpenter, applied with equal force in his favor, and thus he is within the intention. Now, all this may be admitted, and yet the rule is unchanged. We can only get at the intention of the Legislature from the Act. *Ezekiel vs. Dixon*, 3 *Kelly*, 152; and there is nothing in the Act itself that would indicate that the Legislature intended to extend the lien to any others than those named. But how can the Court resort to the intention of the Legislature or to the reason or the spirit of the Law, when the Law itself is plain, clear and unambiguous? But aside from all this, the Act is in derogation of Common Law and of common right, and must be constructed strictly and extended no farther than its words plainly import. *Dudley*, 105; *Carr vs. Ga. R. R. & B'k Co.*, 1 *Kelly*, 583; *Young vs. McKenzie*, 8 *Kelly*, 38; *Mayor vs. Hartridge*, 8 *Ga.*, 23.

Undoubtedly, the plasterer, in justice and Equity, is as much entitled to the lien for his protection and security as the mason or carpenter, but he cannot have it without a Law, and the Law does not reach or include him.

Judgment affirmed.

LOWE vs. BRYANT, Administrator.

1. One W. H. L. being in treaty of marriage agreement with M., his intended wife, agreed with her in parol that the property he should receive by her on the marriage, he would give to her and the children of their marriage by Will; after the marriage prepared a Will according to that agreement, and kept it by him for that purpose; subsequently executed such Will, and immediately afterwards, by codicil, so changed the disposition of that property as to give his wife only a life-estate in the property: *Held*, That upon the execution of the Will, the agreement was executed, and excluded him from making any subsequent disposition, by codicil or otherwise, that would defeat the agreement, and it must be enforced.

In Equity, in Taylor Superior Court. Tried before Judge WORRILL, at April Term, 1860.

This was a bill filed originally by William K. Lowe, executor and legatee in remainder, of William H. Lowe, deceased, against Martha T. Lowe, widow of testator, to compel her to give bond and security for the forth coming of certain negroes and other personal estate, which the bill alleged she held only for life, under the terms and provisions of the last Will and Testament of said testator.

The following is a copy of said Will and Codicil thereto:

"GEORGIA, TAYLOR COUNTY:

"I, William H. Lowe, of the county and State aforesaid, being of advanced age, but of sound and disposing mind and memory, and being desirous of making a disposition of the effects with which a kind Providence has blessed me, *after my death*, do make this my last Will and Testament, hereby revoking and annulling all others heretofore made by me.

"Item 1st. It is my will and desire that my body be buried in a decent and Christian-like manner, suitable to my circumstances and condition in life. My soul, I trust, shall return to rest with God, who gave it, as I hope for eternal salvation through the merits and atonement of Jesus Christ.

"Item 2d. It is my will and desire that all my just debts be paid by my executors hereinafter named, as I am unwilling my creditors should be delayed of their rights, especially as there is no necessity for delay.

Lowe vs. Bryant

"Item 8d. I give, bequeath and devise to my beloved wife, Martha T. Lowe, for and during her natural life, the following property, to-wit: George, a negro boy about eighteen years old; Ellen, a woman about 22; Tilly, a girl about ten; Ben, a boy about five; Osborn, a man about fifty; and Mariah, a woman about fifty years old. All of the household furniture which I received by my said wife upon our intermarriage, to-wit: *one teaster bedstead and furniture, one bureau, one work-stand, one half-teaster bedstead and furniture, four trunks, two wash-stands, three looking-glasses, and one brass clock.* And at the death of my said wife, Martha T. Lowe, my will is, that said property shall go to and become the property of my child or children which my said wife may have living by me, to them and their heirs forever; and in the event that my said wife should not have by me any child or children at her death living, then said property to become the property absolutely of my said wife, to be disposed of as she may think proper by Will or otherwise.

"Also, I give, bequeath and devise unto my said wife, Martha T. Lowe, for and during her natural life, the following lands, to-wit: Twenty-five acres off of lot No. 224, in the north-east corner of said lot, in the 3d district of originally Muscogee, now Taylor county, and 125 acres off of the west side of lot of land No. 242, in the 2d district of originally Muscogee, now Taylor county, with all the members, rights and appurtenances; also, my match-horses, rockaway and harness. And at the death of my said wife, said land, horses, rockaway and harness shall be equally divided among all my children subject to the restrictions hereinafter named.

"Item 4th. I give and bequeath unto my step-daughter, Jeffersonia R. Brooks, one half-teaster bedstead and furniture, and one gold watch, which I received by my said wife upon our intermarriage; and if my said step-daughter, Jeffersonia R. Brooks, should depart this life before marrying or arriving at the age of twenty-one years, then said bedstead, furniture and watch to become the property of my said wife, subject to her disposal.

"Item 5th. I give and bequeath unto my son James M. Lowe, two hundred dollars, to my son Augustin L. Lowe, two hundred and fifty dollars, and to my daughter B—— Lowe, three hundred and fifty dollars, to make them equal with my children to whom I have already given a portion of my property.

Lowe vs. Bryant.

"Item 6th. All the balance of my property of every description whatever, real, personal and mixed, not heretofore disposed of by this my Will, I desire shall be equally divided among all my children subject to the restrictions hereinafter named, share and share alike, to-wit: Patience L. Gates, William R. Lowe, Sarah A. Bryant, James M. Lowe, Augustin L. Lowe, and Roena Lowe (including any children I may hereafter have by my said wife;) the land to be rented and the negroes hired out not exceeding fifteen months, (discretionary with my said executors, they taking into consideration the time of the year in which I may die to govern them as to the length of time of renting and hiring,) and the proceeds of the rent and hire thereof to be applied to the payment of my debts and the specified legacies in this my last Will. My further will and desire is, that the negroes (not heretofore disposed of by this my Will) shall be divided without a sale thereof, and that the balance of my property—lands, household and kitchen furniture, and stock of every description—shall be sold according to Law, and the money arising from the sale thereof be applied to the payment of debts and legacies, and the balance of said money to be equally divided among all my children, subject to the restrictions hereinafter named.

"Item 7th. It is my will and desire, if any of my aforesaid children should die without lawful issue, that then and in that event, his, her or their distributive share of my estate shall go to and be equally divided among his, her or their brothers and sisters, subject to the same restrictions hereinafter named.

"Item 8th. It is my will and desire that all the property conveyed by this my last Will to my children aforesaid, shall go to them respectively in trust for their children; that they shall not have the power to dispose of the property which they may respectively take under and by virtue of this my Will, in any manner whatever, nor shall said property be liable to the payment of the debts of my said children; but at their respective deaths, their respective shares shall vest absolutely in their children and their heirs forever. And if any of my said children should die without lawful issue, that his, her or their share or shares under this my Will to be divided according to the seventh item of this Will.

"Item ninth. I hereby nominate and appoint my sons,

Lowe & Bryant.

William R. Lowe, James M. Lowe, and Augustin L. Lowe,
my executors under this my last Will and Testament.

"In witness whereof, I have herewith set my hand and
affixed my seal, this the 25th day of October. A. D., 1855,

"WM. H. LOWE. [L.s.]

CODICIL.

"GEORGIA, TAYLOR COUNTY:

"Whereas, I, William H. Lowe, did, on the 25th day of
October, A. D., 1855, sign, seal, declare and publish my
last Will and Testament, in the presence of Franklin A.
Royal, Elias W. Bowden, J. P., and James S. Harris, O. J.
C., who signed the said Will and Testament as witnesses;
and whereas, I am desirous of altering and changing a be-
quest in said Will: I therefore make and publish this codicil
to said Will.

"Item 1st. That my sons, after receiving their several be-
quests, named in my previous Will, may have power to dis-
pose of their respective shares as they may think fit and
proper.

"Item 2d. My wife, Martha T. Lowe, to have a certain
negro fellow named Edmund, about forty-four or five years
of age, during her natural life, and after the decease of my
wife, then said negro to go to Martha Ellen.

"Item 3d. To my daughter Martha Ellen, at the death of
my wife, to have all the property heretofore devised to my
said wife, and no more of my said estate, with the exception
of lands left my wife, and the said Martha Ellen to have an
equal share with the rest of my children in said lands.

"Item 4th. Should my daughter Martha Ellen die without
issue, her share heretofore devised shall come back to my
estate and be equally divided amongst all my lawful heirs.
This 25th October, A. D., 1855.

"WM. H. LOWE. [L.s.]

"(Executed before same witnesses.)

"Admitted to record November 6th, 1855, and letters
issued to executors named in Will."

Defendant answered the bill. It appeared that Martha
Ellen Lowe died in 1867, a child of only two years of age;
that she was born after the writing of the Will, but before

Lowe vs. Bryant.

the execution thereof, and before the Codicil was written and executed. It further appeared, that all the property in controversy belonged to defendant prior to her marriage with testator, she being a widow (Mrs. Brooks) when she married Lowe.

All that portion of the answer claiming, and the testimony offered to show that there was a parol ante-nuptial settlement between testator and defendant, was rejected by the Court, and defendant excepted.

The Court below held and charged the Jury, that under said Will, defendant took only a life-interest or estate in the property, and at her death the same went to testator's children; and that complainant was entitled to the relief he sought by his bill.

To which charge counsel for defendant excepted.

The Jury brought a verdict agreeably to the charge of the Court, and counsel for defendant tendered their bill of exceptions, assigning as error the rulings and charge aforesaid.

JAMES T. MAY; EDWARDS & HOLSEY, for defendant in error.

LEVI B. SMITH, GRICE & WALLACE, *contra*.

By the Court.—LYON, J., delivering the opinion.

On the trial, the plaintiff in error offered to prove by James T. Harman, one of the witnesses to the Will, and the person who seems to have written the Codicil, that the testator said, before the Will was executed, and before the Codicil was prepared, that he made an ante-nuptial contract with his wife, Martha T. Lowe, by parol, and that in said contract he did agree, that if he, Lowe, died before the said Martha T., that he would, by Will, give to the said Martha and her children all the property that he should receive by said Martha upon their intermarriage; and that he had this Will written in accordance with said ante-nuptial contract, and kept it by him for that purpose. Upon objection, the Court ruled out the evidence, and we think that such ruling was error. It is true, that the evidence was offered, not for the purpose of enforcing such ante-nuptial contract, but for

Lowe vs. Bryant.

the purpose of sustaining or aiding the construction put on the Will and Codicil by the defendant. The evidence was not competent for that purpose, as there was no ambiguity about the Will or Codicil. The import was plain and obvious, giving to the widow only a life-estate in the property in controversy, but the evidence was admissible for the purpose of setting up and enforcing such ante-nuptial contract. If it was true, that the testator did make such ante-nuptial agreement, and his admissions are competent to prove it, and he had this Will written in accordance with such agreement, and kept it by him for that purpose, this was such a part performance of the agreement as took the case out of the Statute of Frauds, even if it was within the Statute, which, in the opinion of this Court, is very doubtful. And when the testator signed and executed that Will, it became a fully executed one, and could not be altered by any codicil or subsequent Will, that he could make. In *Cookes vs. Mascall*, 2 Vern., 200, the parties had agreed among themselves upon terms of settlement, and the agreement was drawn up in articles, in writing, to be mutually signed, but was not, either before or after. The Court decreed that Mascall should perform the agreement according to what was contained in the writing, as was intended should have been done, although no other agreement was reduced to writing.

In *Taylor vs. Beech*, 2 Ves., Sr., 297, the property of the wife, by a previous marriage, was agreed to be assigned to trustees for her separate use during her coverture, and to be applied, after her death, to such uses as she should appoint. They sent to an agent to prepare the writing, but the marriage took place before the agreement could be carried out. A proper draft of assignment was afterwards proposed, in which alterations were made by the husband's own hand-writing. On delivering it to the wife, he told her he had made no other alteration than was for her benefit, and suffered her to receive it to her separate use during coverture. The wife, by will, gave the £500 to the plaintiffs, who filed the bill for it. The defendant pleaded the Statute of Frauds because of the agreement not being reduced to writing. The Court overruled the plea, saying that the agreement was good, if afterwards signed by him; "that the rule extends not to facts subsequent, viz: showing a part performance in which the Statute cannot be pleaded." The correctness of

Castleberry vs. Weaver.

the first decision has been greatly doubted as being a violation of the Statute of Frauds, and it is only cited to show the extent to which the highest Courts of England have gone to take these cases out of the Statute of Frauds, and that even those Courts will lay hold of the slightest circumstances for that purpose. This Court, in coming to its conclusion in this case, was not governed by that case or any like it, but on the facts proposed to be proven by Harmon. If the statement in the record is true, we hold that it presents a complete reply to the relief prayed for by the complainants.

But for this, the case would be with the complainants.

Judgment reversed.

CASTLEBERRY vs. WEAVER.

1. One who buys land that is, at the time, under levy, as the property of a third person, whether he in fact had notice of such judgment, execution and levy at the time or not, cannot be protected against the lien of such judgment and execution as an innocent purchaser.
2. If one is indebted, as guardian, to another, who was his ward and turns over land or other property, that is at the time subject to the lien of judgments in favor of third persons, in payment of what he owes his ward, as guardian, and afterwards dies, the land still continues subject to the lien, and is not protected from levy and sale under the Statute of 19th February, 1799, "For the protection and security of orphans and their estates."

Claim, from Clay Superior Court. Tried before Judge ALLEN, at March Term, 1860.

This was a claim issue, in which William Castleberry was plaintiff in *ft. fa.*, Thomas J. Watts defendant, and Shelton R. Weaver claimant. The lots levied on were 250, 260, and 262, in the 7th district of formerly Randolph county. Th

Chancery vs. Weaver

judgment on which the *ex. fa.* was founded was obtained in April, 1844. A levy had been made in October, 1844, dismissed in May, 1849, renewed in 1849 and again in 1856.

It was put in proof by the plaintiff, on the trial, that Watts, the defendant in *ex. fa.*, was in possession of the land known as Weaver's Mills, in 1832 or 1833. Benjamin F. Watts and one Garner lived on the land, but Thomas J. Watts controlled and exercised acts of ownership over it with Benjamin F. Watts, and both claimed it up to 1839 or 1840. Then Benjamin F. moved off to Baker county and left Thomas J. in full control, who claimed it as his own. He went out of possession in 1845 or 1846, when he moved to Florida. Garner and Weaver went into possession in 1846, after Watts left, and remained in possession three or four years, then Weaver went in possession. He was in possession in 1856. Weaver, the claimant, took possession in 1858.

On the part of claimant, there were various deeds put in evidence, showing title from the State, through various parties, for the three lots down to B. F. Watts, who had deeds for each for some time previous to 1855, and who conveyed his title to each, in 1846, to William L. Morgan and Thomas W. Garner. In 1850, Garner, as administrator of William L. Morgan, deceased, sold and conveyed to B. H. Kizer one fifth part of these lots, and Kizer sold the same interest to Garner the same year. In 1852, Garner conveyed the whole to Weaver, the claimant. The interest of James W. Morgan and John C. Oats (what interest not stated) therein had been by them conveyed to Garner in 1848. Also, the indefinite interest of Elizabeth Watts, conveyed from Chambers to her in 1845, was conveyed by deed to claimant, Weaver. It was in proof that Thomas J. Watts said, in 1842, that the lots belonged to Benjamin L. Watts.

In rebuttal by plaintiff, it was proven that Thomas J. Watts became the Guardian of Thomas W. Garner and his sister, the wife of William L. Morgan, and that B. F. Watts stood his security on the guardian's bond; that Thomas J. Watts said that Benjamin F. had used the money of his ward, and that Benjamin F. must pay the money due them. This was in 1845.

A witness stated that he persuaded Garner to take this property in dispute in payment of the debt Thomas J. owed

Castleberry vs. Weaver.

him, as guardian, and did so because both the Watts were in bad pecuniary condition; that Garner had better take that than nothing; Garner complained of the price, but a few days afterwards, B. F. Watts came down and Garner said he had bought the property and Thomas J. was largely indebted to him, and took property in part payment.

It was further proven that Thomas J. Watts went into possession of the Mill property in 1833; that one Cannon was in possession in 1832; in 1833, Thomas J. exchanged his interest in a steamboat with Cannon for the latter's interest in the Mill property, and then owned the same with B. F. Watts; B. F. Watts afterwards exchanged his interest in the Mill property with Thomas J. Watts for the latter's interest in the Baker county Mills, and that Thomas J. then controlled the Mill property in dispute; this was in 1839 or 1840; Thomas J. Watts died in 1845 or 1846.

The evidence having closed, counsel for plaintiff requested the Court to charge the Jury—

1st. That if Thomas W. Garner had notice that Benjamin F. Watts had to obtain the consent of Thomas J. Watts before he could make a title to the property in controversy to Garner, it was sufficient to put him on his guard, and that he is not an innocent purchaser without notice.

2d. That if the claimant, Weaver, had notice of the pendency of this levy and claim to the property when he purchased it, that was sufficient to put him on his guard, and that he is not an innocent purchaser without notice.

3d. That the defendant in *fa. fa.* could not, while in life, turn over his wards' property in satisfaction of the obligation under the guardian's bond to the exclusion of other judgment liens on the property that had attached before the date of the transfer.

The Court refused to charge these requests, but did charge, That if the Jury believe that Thomas J. Watts was indebted to Garner, as his guardian, that it was a debt of prior dignity to any after debt; and if the Jury believe that he turned the property over to him in payment of said obligation and died soon after that, plaintiff cannot recover; that he could do himself what Equity would compel him to do, and the purchaser will be protected.

The issue having been found in favor of the claimant, counsel for plaintiff moved for a new trial on a great num-

Cantelberry vs. Weaver.

ber of grounds, amongst which were the said charge and refusal to charge by the Court.

The Court overruled the motion, and plaintiff's counsel excepted.

DOUGLASS & DOUGLASS, for plaintiff in error.

LAW & SIMS, *contra*.

By the Court.—LYON, J. delivering the opinion.

1. We do not take this to be one of the cases where a purchaser, without notice of the outstanding lien, will protect the purchaser against such lien, for the reason that at the time of the sale from Benjamin F. Watts to William L. Morgan and Thomas W. Garner, of the several lots in controversy—say for one of the lots on the 8th day of February, 1846, and for the two others on 20th February, 1846—the lands were actually under levy, by virtue of this execution, and so have continued constantly from then down to the trial, except for a few months during the year 1849; and purchasers are bound to take notice of such outstanding lien and levy, and should they in fact buy without notice, the want of such notice will not protect the lands from the judgment and execution. So we think the Court erred in not giving the charge requested by counsel for the plaintiff; that is, if Garner and Weaver, the purchasers from Benjamin F. Watts, had notice of Thomas J. Watts' interest or claim in the land, or of the pendency of the levy and claim, the present claimant is not an innocent purchaser without notice.

2. The evidence, as well as the charge of the Court, disclose the fact, that the claimant relied for protection of his title against the execution, on the fact, that at the time of the purchase and title from Benjamin F. Watts to William L. Morgan and Thomas W. Garner, Thomas J. Watts was indebted to Morgan and Garner, as their guardian, or as the guardian for Garner and Morgan's wife, and that they took this land in settlement or payment of what Thomas J. Watts was due to them, as guardian, and that as Thomas J. Watts has since died, the superior lien created by the Statute of 18th February, 1799, *Code*, 288, in their favor, in which the executor or administrator of a deceased guardian, &c., is

Lesterberry vs. Watts.

compelled to pay out of the estate of such deceased guardian or so much as shall appear to be due to the estate of such ancestor, &c., before any other debt, would perfect their title so acquired, and protect it from the judgment. On this subject, the Court charged the Jury, that if Thomas J. Watts, as guardian, was indebted to Garner, that it was a debt of prior dignity to any other debt, and if the Jury believe that he turned over the property to him in payment of said obligation, and died soon after that, plaintiff cannot recover; that he could do himself, what Equity would compel him to do, and the purchaser will be protected." In this there was error.

So long as Thomas J. Watts, the guardian, was in life, there was no priority as to debts due by him, as guardian over judgment liens or any other debts, and he could not be forced by Equity, nor could he voluntarily or otherwise make a disposition of any of his property that would defeat or impair the lien of this judgment, nor does his death give any additional validity to the transaction that could possibly protect this property from the lien of this judgment. The effect of the Statute is to give priority of payment by the administrator or executor of the deceased guardian out of the estate of such deceased guardian for such debt as the guardian shall die chargeable to with his ward. The Statute goes no farther, and the Court cannot extend it any farther. It certainly could never be construed to vest a title to any of the guardian's property in the ward for the payment of the debt, and that is the effect of the charge. Had Watts died chargeable to Garner and Morgan, or either, as guardian for them, and this property had been administered, the administrator would have been compelled to pay such debt therefrom in preference to this judgment. The question before the Court, and in which the parties were at issue, was, whether the property was subject to the plaintiff's lien? and with that the equities that might exist between the estate of Watts and his wards had nothing to do, and the Court should have recalled all evidence relating thereto from the Jury, as being irrelevant to the issue.

The Court is clear, that if the witnesses have testified truly—and they stand before us unimpeached—and are to be believed—the property is subject to this execution, and so the judgment ought to be.

Pope vs. Hays.

There are a number of questions made in the report which we have not noticed, arising upon objections to the admissibility of the paper title from the State of Georgia down to B. F. Watts, because both parties claim under the same title down to that point, and it is to the interest of each that that much of the title should be sustained; hence, an objection to it from either party is irregular, and so of the paper title from B. F. Watts down to claimant, it is indifferent to the claimant whether that title is regular or not, as that in no wise affects his lien on the property.

Judgment reversed.

POPE vs. HAYS.

1. There is no appeal under the Act of 1856, directing the mode in which one year's provision shall be set apart for the family of the deceased.

On appeal, in Sumter Superior Court, from Report of Commissioners, assigning Year's Support to Widow and Children. Decided by Judge ALLEN, October Term, 1859.

The plaintiffs in error, being the widow and children of H. W. Shaw, deceased; having been awarded the sum of \$400 for their twelve month's support, by commissioners appointed by the Ordinary for that purpose, and being dissatisfied with that allowance, carried the case to the Superior Court by appeal.

On the hearing, counsel for defendant moved to dismiss the appeal, on the ground "that no appeal is provided for by Law from the report of commissioners to the Ordinary, to the Superior Court.

The Court sustained the motion on the ground taken, and ordered the same to be dismissed, and appellant excepted.

JANES vs. TOMLINSON.

B. H. HILL, for plaintiff in error.

MCCAY & HAWKINS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question in this case is, whether an appeal will lie, upon the report of commissioners appointed under the Act of 1856, to set apart one year's provisions for the family out of the estate of the deceased?

We think not. There is no verdict—no judgment of the Court to appeal from. The Act simply directs the report to be recorded by the Ordinary. This is a mere ministerial Act to preserve the evidence, and to show upon the Books of the Ordinary's office the manner in which so much of the estate was disposed of, neither can the commissioners, whose report is sought to be set aside, be considered the ordinary *pro hac vice*. This would violate the Constitution, which directs who shall be the Ordinary.

JANES vs. TOMLINSON.

1. When the creditor states in his affidavit under the Garnishment Act, "That he has commenced his action of complaint in the Superior Court of Dougherty county, against Thomas A. Janes, his debtor, and that he has reason to apprehend the loss of said sum. (\$732 in account,) or some part thereof, unless summons of garnishment do issue," it sufficiently identifies the case in which the process is sued out.
2. A garnishment bond is amendable under the Act of 1856, so as to conform to the Law.

Garnishment, from Dougherty Superior Court. Decided by Judge ALLEN, June Term, 1860.

Robert L. Tomlinson, pending an action of complaint in hi

Janes vs. Tomlinson.

favor against Thomas A. Janes, made his affidavit and gave bond for process of garnishment in his behalf in said case.

At the June Term aforesaid, counsel for Janes moved the Court to dismiss said garnishment process, on the ground that the garnishment bond "did not show that it was given in any case, or that there was any case pending." Whereupon, counsel for plaintiff moved to amend the bond by inserting a statement of the case therein. The Court sustained the motion, and ordered the bond to be amended. To which defendant's counsel excepted.

(The garnishment affidavit did state that an action of complaint was pending in favor of the said Tomlinson, against Janes.)

STROKER & SMITH, for plaintiff in error.

HINES & HOBBS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We are inclined to think the bond was good as it was, and for myself, I am clear, that if it were not, it was amendable under the Act of 1856, which gives to plaintiffs in attachment, and consequently, garnishments the right to amend their attachment bonds or declarations as in other cases at Common Law.

And as to the security, he signed the bond under the Law which authorizes it to be amended, so as to conform to the Law. This was his contract.

Walden vs. McDonald.

WALDEN vs. McDONALD.

1. A plaintiff in Trover cannot enforce a judgment for the value of a slave which he had in his possession at the time of the recovery, nor for his hire during the time that he held said slave previously. In such a case, Equity would interpose and restrain the proceeding.

In Equity, from Lee Superior Court. Decided by Judge PERKINS, at March Term, 1860.

The plaintiff in error, Walden, filed his bill in Equity against William T. McDonald, alleging, that in the year 1853 said McDonald instituted his action of trover and bail in the Superior Court of Lee county, against Seaborn J. Walden, the brother of complainant, for the recovery of a negro man, Lewis; that at the last Term of said Court, the paper in said case having been burnt with the Court-house, said McDonald established copies thereof, from which it appears that complainant became the security for the said Seaborn J. on the bail bond in said trover action. Complainant alleges that he has no recollection of ever becoming such security, and believes he never did. It is further alleged that judgment was obtained against said Seaborn J. in said trover suit for \$360, to be discharged on the delivery of the negro and \$250, for hire; and thereupon a *fi. fa.* has been issued and levied on the property of complainant, as security aforesaid, to satisfy the same; that Seaborn J. is insolvent; that he paid but little attention to said suit whilst pending, and that complainant took no interest in it, not supposing he himself, had any interest in it. It is charged, that said recovery is fraudulent in this: that sometime in 1856, said McDonald took possession of said slave; had had him ever since, and now has him in his control, and that he concealed this fact from the Court and Jury, and got a verdict for the value of said negro and his hire. The prayer of the bill is for an injunction restraining the collection of said *fi. fa.*, &c. The Court granted the injunction, order, &c.

The defendant answered the bill, admitting the institution of the suit against Seaborn J. Walden, as charged, taking the judgment thereon, the issue and levy of the *fi. fa.* and the insolvency of the said Seaborn J., but denies that a

Walden et. al. vs. Seaborn et. al.

the papers in said case had been destroyed; and says, that none of the papers were destroyed but the bond given by Seaborn J., as principal, and complainant as security; that the declaration was in the custody of defendant's counsel; and that there was an entry endorsed on it by the Sheriff, Mayo, that he had discharged the defendant, Seaborn J., on taking bond, and Winson H. Walden as security; and that said Sheriff had afterwards informed defendant that he had arrested said Seaborn J. and taken bond, with security, as above stated; that the bond was the only paper lost, and a copy thereof had been duly established, the complainant's attorney having been present at the time and consenting thereto; denies that said Seaborn J. neglected the defense of his case, but insists that he made by himself and counsel as good defense as he could; says he got possession of the negro as follows: Some time in the fall of 1856, learning that Seaborn J. intended to remove the slave to Florida, and not regarding either the principal or surety in said bond as very reliable, he sued out an attachment against Seaborn J. and had it levied on said negro by the Deputy Sheriff, who kept him in his possession for some three months, and defendant finding said Seaborn J. would not replevy him, defendant offered a bond, with good security, to the Deputy Sheriff for the possession and return of the negro when he might be called for, which was accepted; and thus the negro went into possession of defendant, and has been in his possession ever since, uncalled for; and further, that when said *f. fa.* issued, the Sheriff was instructed to levy the same on said negro, which was done, and he was advertised for sale; denies all fraud and concealment as charged.

Defendant's counsel moved the Court, on the coming in of his answer to dissolve said injunction and dismiss said bill, on the ground that the Equity in the bill was sworn off by the answer.

The Court sustained the motion and ordered the bill to be dismissed and the said *f. fa.* to proceed. To which complainant, by his counsel, excepted.

VASON & DAVIS, for plaintiff in error.

WARREN & WARREN, contra.

By the Court—LUMPKIN, J., delivering the opinion.

One thing is clear: the injunction in this case should not have been dissolved until a release was executed by McDonald of the value of the negro recovered by him of Walden in the trover action; and Walden was entitled to a credit for the hire of the boy Lewis from the time he was turned over by the Sheriff to McDonald. The fact, too, that McDonald had possession of the negro at the time he was recovered, was such a concealment of the truth from the Court and Jury as should entitle Walden to the relief which he seeks.

McDonald pretends that he is responsible to the Sheriff for the forthcoming of Lewis. He had Lewis attached, he says, to prevent him from being run off to Florida by Seaborn Walden. The Jury, by their verdict, have found that Lewis belongs to him. What has he to apprehend from his forthcoming bond?

We know nothing of the parties or the surety of this litigation; but one thing is manifest, and that is, that our selfishness causes us to mistify the plainest details of justice in this world.

So far from the Equity of the bill being denied, we think it is fully admitted by the answer as to all the material facts. Our conclusion, therefore, is, that the injunction should be retained until a Jury can do what is right between the parties, provided they themselves will not save the country this further trouble by settling the matter. Because people go to Law, is no reason why they should continue to litigate to the bitter end, after they understand their rights and duties. One thing is sure: the idea of withholding Lewis from market, because he was overworked by Seaborn Walden, cannot justify the sale of a security's property.

LINDSAY vs. KENDRICK & CO.

1. When an original paper is sued and declared on as the act of the maker thereof, and he does not deny it on oath, but confesses judgment, and afterwards, while the case is on the appeal, such paper be destroyed, in the absence of a plea of *non est factum*, and the proof of such fact and the contents, plaintiff is entitled to recover on the same, without further proof of its execution.
2. A party is not obliged to establish a lost paper under the Judiciary Act, but may recover upon proof of its contents as a lost paper.

Complaint, from Lee Superior Court. Tried before Judge PERKINS, at March Term, 1860.

The defendants in error brought an action against Samuel Lindsay for the amount of money due on a certain draft accepted by him, returnable to the Inferior Court of Lee county.

The defendant having confessed judgment at the judgment Term, carried the case, by appeal, to the Superior Court. Before a trial was had on the appeal, the Court-house was consumed by fire, destroying the office papers connected with the case, but copies of which were subsequently established.

On the trial of the case, plaintiff proved by one Murry, by commission, that he, at and before the date of the draft, was book-keeper of plaintiff's and he attached to his answer a copy of the draft sued on, and two others; he stated that the original draft was written by him at the instance of the drawer; that he did not see Lindsay accept it, but the drawer carried it out and returned with Lindsay's acceptance. To this evidence defendant objected—

1st. Because the draft was not established according to Law.

2d. Because there was no evidence of the loss of the original.

3d. Because the execution of the draft must first be proven.

Plaintiff then proved by J. J. Scarborough, that judgment was obtained in the Inferior Court; that the declaration and other proceedings and the draft were left in the Court-house; that the Court-house, with its contents, were subsequently destroyed by fire, and he had no doubt the original draft was burned.

Lindsay vs. Kendrick & Co.

Upon this proof, the Court overruled the objection, admitted evidence of the contents of the original draft, &c., and the Jury found for the plaintiff. To which rulings the defendant excepted.

WARREN, for plaintiff in error.

SCARBOROUGH, *contra*.

By the Court.—LYON, J., delivering the opinion.

1. The original draft, with Lindsay's acceptance on it, or rather the paper which was the foundation of the suit and declared upon as his act, Lindsay not only did not deny, on oath, as required by the Statute, in order to put its execution in issue, but at trial Term, at Common Law, confessed a judgment on its evidence, to the plaintiff, and took an appeal. While the appeal was pending, that original paper on which Lindsay had confessed judgment, was burned. These facts, in the absence of a plea denying the paper sued on to be his, were proper to be submitted to the Jury, and sufficient to warrant a finding against the defendant.

2. A party is not obliged to establish a lost paper, under the Judiciary Act, but may, by showing its loss or destruction, as in this case, give in secondary evidence of its contents, and upon sufficient proof, recover on it as a lost or destroyed paper. See *Ross & Co. vs. Wright*, 12 Ga., 500.

Judgment affirmed.

INGRAM vs. MITCHELL.

1. The rule of Law is stern and well settled, that when a plaintiff comes into Court, he must recover upon his own merits, and not upon the demerits of the defendant, unless where the Statute has created an exception.
2. Chancellor Kent thinks the Courts have gone quite far enough in refusing to help either party, in respect to illegal contracts.
3. Whenever the plaintiff can make out his case, without invoking the illegal contract to his aid, he is entitled to recover.
4. Where an agent receives money for his principal upon an illegal contract, he cannot avail himself of that defense in an action brought against him by the principal for money had and received to the plaintiff's use, especially when those who paid over the money to the agent, do not desire that he should retain it.
5. When money is actually paid over upon an illegal contract, it is clear that it cannot be recovered back, the contract being executed, and both parties being in *pari delicto*.
6. A party may, in some cases, be allowed to retain money which was due to him *ex equo et bono*, but which he could not have recovered at Law; yet, he never can be allowed to retain money to which he has no claim whatever against the true owner.
7. As to the distinction in some of the cases, resulting from the knowledge or ignorance of the agent, as to the illegality of the contract upon which the money was paid, that can make no difference.

In Equity, from Taylor County. Tried before Judge WORRILL, at October adjourned Term, 1859.

This bill was filed by Bryan Ingram to make Benjamin F. Mitchell account to him for the proceeds of the sale of a negro slave named Simon, that the complainant, as owner, had placed in the hands of defendant for sale, under the circumstances following:

In the year 1856, the slave Simon was committed to jail to await his trial on the charge of attempting to commit a rape on a free white female in the county of Taylor; and afterwards, at the October Term, 1856, of Taylor Superior Court, a true bill, charging him with said crime, was found against him. Previous to October Term, Ingram, the owner of the slave, gave bond for the appearance of the slave at court, and took charge of him, the prosecutor consenting. On the 16th day of August, 1857, Ingram entered into an agreement with Mitchell by which the latter should take

Ingram vs. Mitchell.

Simon away and sell him, and that in the event he sold him, he was to account to complainant for \$1,200, as the amount to be due him; if no sale, then the boy was to be returned to his owner.

This was the agreement: Defendant was to be the agent, or attorney in fact, of complainant in the sale of the slave; but as a mode of carrying the agreement into effect, and to enable Mitchell to convey title to the party to whom he should sell, Mitchell gave Ingram his promissory note for \$1,200, payable to him, or bearer, by the 1st day of June, 1858, with a condition attached thereto, that should Mitchell not sell Simon, but should return him in good condition, then the note to be void. Ingram then executed to Mitchell a bill of sale for Simon, and delivered him into his possession, and Mitchell afterwards sold him in Baker county, Georgia, for \$1,200.

Ingram's object in sending off the slave and selling him, and which was understood between the parties at the time, was to save his life, then endangered by the charge against him.

At the April Term, 1857, of said Superior Court, the bill of indictment against Simon was *not pros'd*.

Afterwards, Mitchell being called on to pay over the \$1,200, the proceeds of the sale made by him, refused to do so; and this bill having been filed against him to require him to account for such proceeds, he sets up, in his answer; the circumstances out of which the agreement between him and the complainant arose, insisting that the agreement having been made to screen Simon from trial and punishment, is illegal, and that he cannot be compelled to account to complainant, as prayed for in the bill.

These facts being developed on the trial, the Jury, under the charge of the Court, found for the defendant.

Whereupon, counsel for complainant moved a rule for a new trial, on various grounds. The 3d and 4th are all that are deemed necessary to be here stated, and are as follows:

3d. Because the Court erred in ruling and deciding, on motion being made by defendant, to dismiss complainant's bill: that complainant could only recover, if at all, on the note or contract in writing set up in complainant's bill, and in restricting complainant's rights to a decree, if he had any right to said contract or note.

Ingram vs. Mitchell.

4th. Because the Court erred in charging the Jury in this case, that if they should find that the negro Simon, the subject of this suit, was charged with a capital crime, and that complainant and defendant entered into the contract or agreement sought to be enforced by this suit, for the purpose of preventing the negro from being brought to trial and punishment for such crime, then the agreement was void, and could not be enforced in a Court of Justice; and it made no difference whether the Act of 10th May, 1770, was of force or not; that in the absence of legislative enactment, such contracts or agreements are void, as opposed to the policy of the Law, being in prevention of public justice, and they must find for defendant.

The Court refused the rule for a new trial as to all the grounds, and counsel for complainant excepted.

GRICE & WALLACE, and HUNTER, for plaintiff in error.

SMITH & POW, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

I do not think it altogether certain that Mr. Ingram either violated the Act 1770, (*Prince*, 780,) which inflicts a penalty of £200 upon any one who conceals and carries off a slave accused of a capital crime, so that he cannot be brought to trial and condign punishment," or has committed an act against the public justice of the county. True, he directed Mitchell to convey the boy away secretly and to sell him; but he did not require him to be taken beyond the limits of the State. And in point of fact, he was sold in Dougherty county, not very remote from the place where the alleged offense was committed. The prosecution was quashed ten or twelve days before the negro was sold, the woman herself and every body else being satisfied of his innocence; and then he was immediately re-purchased and brought back by Ingram, where he has remained unmolested ever since.

I remark, that I assume, as the foundation of a portion of these remarks, that the facts were in, which the plaintiff offered to prove, but which he was not allowed to introduce by the Court, and, as we think, improperly.

I am fully sensible of the gross impropriety of endeavor-

Ingram vs. Mitchell.

ing to screen a slave from merited punishment, especially for offences committed against white females. I am not insensible to the fact, however, that, prompted by humanity, and from no mercenary motives, masters are sometimes induced to put their slaves out of the way to prevent them from becoming the victims of popular excitement, until the tempest of passion is past and reason has resumed her sway. And while this motive even cannot justify the act, it goes far to mitigate its criminality.

I confess, that it is not without doubt and some misgiving that I have come to a conclusion in this case. Chancellor KENT, in *Vesicher vs. Zate*, 11 *Jonson's Rep.*, 28, thought the Courts had gone quite far enough, when they refuse to help either party, with respect to these illegal contracts; and he referred to the Statute against gaming, which allowed the loser to recover back of the owner his lost money, thereby inferring that the Courts had gone one step beyond the Law-giver; and yet, the rule of Law is stern and settled, that when the plaintiff comes into Court, he must recover on his own merits, and not upon the demerits of the defendant, unless where the Statute has created an exception.

The rule hitherto applied by this Court, and perhaps by the English Courts, is this: that whenever the plaintiff can make out his case without invoking the illegal contract to his aid, he is entitled to recover. The Judge held in this case, that the plaintiff must recover upon Mitchell's note or not at all. Concede this: What is to prevent Ingram from recovering on the note? True, it has a condition annexed to it to the effect, that if the negro was not sold, and returned in good condition, the note was to be void. The boy was not returned, but sold. Why should Mitchell not pay the note?

But apart from this, Ingram ratifies the sale and claims the purchase money. Can Mitchell refuse to account for it? Mitchell sets up the illegal contract to screen himself from liability. Will the Court allow him to protect himself under it? He must abide by the contract or repudiate it. If he abides by it, he must pay; if he repudiates it, he holds in his hands the price of Ingram's negro, and he must turn it over.

There is a class of cases which puts the right of the party to recover upon the ground of agency; and *Tennant vs. Elliott*, (1 *Dess. and Pul.*, 3,) is a strong authority upon that

Tagram vs. Mitchell.

point. There, the defendant being a broker, effected an illegal insurance on a ship. The vessel being lost, the underwriters paid over the money to Elliott, who refused to pay it over to the plaintiff, on the ground of the illegality of the contract. But the Court said that he should not be allowed to set up the illegality of the contract as a defense in an action brought against him by Tennant, for money had and received for the plaintiff's use. This case must be overruled, or else the complainant is entitled to maintain this bill.

Chief Justice EYRE said: "The question is, whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him? I think not." And Mr. Justice BULLER asked: "Can the defendant in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? Who is entitled to it but the plaintiff?"

In a note to this case, it is said: "If this money had been paid by the underwriters directly to Tenant, the insured, it is clear he could retain it against them, the contract being executed, and both of the parties being in *pari delicto*." (Citing *Douglas*, 470; *Cowper*, 199, 200, 792; 1 *Hen. Black.*) The money would, in that case, in any sense, belong to Tennant; does it not equitably belong to him, when paid to his agent for him?

And in *Farmer vs. Russell*, *ibid*, 296, it was held, that while a party in some cases would be allowed to retain money which was due to him *ex equo et bono*, but which he could not have recovered at Law, yet he never can be allowed to retain money to which he has no claim whatever against the true owner.

We agree with Mr. Justice ROOKE, in the last case, that the distinction, as to the knowledge or ignorance of the agent, make no difference, as it would produce this strange consequence: That if he be ignorant of the illegality in the contract, he shall be answerable in this action; but if guilty as articeps, he shall be free. His innocence should work as to him, while his guilt shall be his indemnity.

We hold, therefore, that the Court was wrong in charging the Jury, that the defendant was not liable upon the case made by the pleadings and evidence.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT

MACON,*.....JUNE TERM, 1860.

Present—JOSEPH H. LUMPKIN, }
LINTON STEPHENS, } JUDGES.
RICHARD F. LYON, }

DOE *ex dem. et al. vs. ROE, Casual Ejector, et al.*

1. Where the proof shows that the defendant in an action of ejectment was in possession of the lot of land in suit, the year before suit was brought and after the suit was brought, this is sufficient evidence of possession of the premises to authorize a recovery against him.
2. When land was drawn by, and granted to W. H.'s orphans, and there be a demise in plaintiff's declaration from them, and the grant is in evidence with proof of possession by defendant, and no adverse title is relied on by defendant, the plaintiff is entitled to a verdict.
3. The fact that the deed from the drawers of the lot to the plaintiff's ancestor does not contain the number of the district, the land being otherwise sufficiently described; or the date of the month of the execution of the deed is left blank, and that the deed was not recorded in time, or that the drawers were swindled out of the land, do not affect the plaintiff's right to recover as against a mere wrongful holder, there being no other deed from the drawers; and so the Court ought to instruct the Jury.

* This case from page 488 to 503, preceding, should have been inserted under MACON, JUNE TERM, 1860. They were added to the Savannah Term by mistake. For.

Dye et al. vs. Roe et al.

Ejectment, in Lee Superior Court. Tried before Judge PERKINS, at March Term, 1860.

The plaintiffs in error brought this suit against defendants to recover lot of land No. 30, in the 14th district of said county.

On the trial, plaintiffs put in evidence a grant from the State for said lot, issued to William Hooper's orphans, of Merritt's district, DeKalb county, dated 9th April, 1835.

Also, a deed from Daniel R. Turner, Edward L. McGriff, and Harrison Hooper, to James J. Blackshear, dated in 1835, the month and day of the month left blank; also, the district in which the lot was situated.

To the introduction of which deed objection was made, when offered, and the objection overruled.

Objection was also made that the month was not set forth in the affidavit of Mitchell B. Jones proving the execution of the deed, and did not show that the certificate of record was not before the probate of the deed.

Plaintiff proved by one Martin that he, Martin, bought the lot from defendant, and let him take it back in the fall of 1858; paid rent to him; thinks the lot was in cultivation in 1844; does not know by whom; cannot say the defendant was in possession in 1854, or whether any crop was made on it; saw some advertisements on the trees about warning persons not to trespass on it; thinks the defendant or his tenants have been in possession since 1854 until now; rent worth \$2 per acre; witness lives upon the adjoining lot; never knew any other person in possession of the other lot but defendant and his tenants.

It was in proof that the lessors set forth as the heirs of James Blackshear, were the widow and only children of James Blackshear, deceased; that Harrison Hooper and the wives of Daniel R. Turner and Edward L. McGriff were the orphans of William Hooper at the time of giving in and drawing the land, and who, a witness, Jones, testified had been swindled out of their land by a land speculator.

J. J. Scarborough testified, that he knew James Blackshear, of Laurens county, son of David Blackshear, and James J. Blackshear, of Thomas county, son of Edward Blackshear; that James Blackshear was married to Harriet

Jones in 1834; that they could not have had a child twenty-one years old in May, 1854.

Defendant introduced no evidence.

The Jury having found for defendant, counsel for plaintiff moved for a new trial, on the following grounds :

1st. Because the Jury found contrary to the charge of the Court in this : The Court charged that the grant to the orphans of William Hooper gave them a good title to the land in dispute, and that they were entitled to recover it of any and every one in possession of it, if the title had not passed out of them to James J. Blackshear or some one else, as they are parties to the suit and claim to recover it ; and that a deed for land need not have a date, but takes effect from the delivery, and a description in a deed which shows what is conveyed, is sufficient, whether it contains any number of district or not ; and if the Jury were notified of this, and the defendant, by himself or tenants, were in possession at the commencement of the suit, plaintiffs are entitled to recover.

2d. Because the Jury found contrary to the charge of the Court in this : That if the deed from Hooper's orphans is so uncertain as not to hold, then the orphans of Hooper, whose deed is so uncertain as not to pass the title out of them, are entitled to recover the land of defendants, if, by himself or tenant, he was in possession at the commencement of the suit.

3d. Because the Court refused to charge the Jury as requested in writing by the plaintiffs, that defendant cannot defend his possession upon the supposition that the orphans of Hooper were minors at the date of the deed in 1835.

4th. Because the Court refused to charge, that the defendant could not defend his possession of the land on the supposition that the orphans of Hooper had been swindled out of their land by a land speculator.

5th. Because the Jury found contrary to the evidence and contrary to Law.

6th. Because the Court refused to charge, that the record of the deed is of no consequence, unless there be a junior deed from the same party.

The Court refused the motion for a new trial, and counsel for plaintiff excepted.

Doe et al. vs. Roe et al.

WARREN & WARREN, for plaintiffs in error.

HAWKINS, *contra*.

By the Court.—LYON, J., delivering the opinion.

The first question in this case is, whether there was sufficient proof of possession of the premises in dispute by the defendant at the commencement of the suit, to justify a recovery? And we think that there was.

1. The defendant had been in the possession previously; had sold and took it back; rented it out for the year 1853, the year before the suit was brought. The lot was in cultivation that year, 1844, and the defendant and his tenants have been in the continued possession since, and up to the trial. All this was sufficient evidence to authorize a finding against him. There is no sense in the rule that requires this proof. Here this defendant has been litigating the right of these plaintiffs to recover this lot for the last six years, and no doubt trying all the time to set up a statutory title in himself to the lot, and on the final trial, because the plaintiff does not show him to be in possession the day suit happens to be brought, he is to be defeated in a recovery. If the defendant was not in possession and holding against the plaintiffs, he ought to have come forward and disclaimed title, or otherwise he should be taxed with the costs.

2. The lot was drawn by, and granted to William Hooper's orphans, and when the grant to them was put in evidence as it was, as there was a demise in the plaintiff's declaration from them, the plaintiff was entitled to a verdict there being no adverse title relied on by the defendant.

3. The plaintiff having put in evidence a deed from the orphans of Hooper to James J. Blackshear, and having also shown who were the heirs at Law of James J. Blackshear, he being dead, was entitled to recover on that demise. The fact that the number of the district was not inserted in the deed, made no difference, as the description otherwise appearing in the deed was sufficiently certain to designate the land intended to be conveyed, nor did it make any difference that the deed did not contain the day of the month on which it was executed. Nor was it material to the defendant whether the deed was recorded in time or not, or whether the

drawers of the land were swindled out of it; and so the Court ought to have instructed the Jury in the absence of any opposing titles from those grantors. It is useless to notice those questions any further, as counsel for defendant frankly conceded that the case was against him, unless the verdict could be supported by the want of proof of possession by the defendant at the commencement of the suit, and we agree with him.

Judgment reversed.

SHOTWELL vs. ROWELL.

While it is true, that in suing one as executor in his own wrong, you must charge him as executor generally, still, if the cabalistic gibberish *de son tort* are dropped in all the subsequent proceedings, and the judgment is entered and execution issued against the defendant as executor, it is sufficient.

Motion, &c., from Baker county. Decided by Judge ALLEN, May Term, 1860.

Jacob R. Shotwell brought suit against Lawrence G. Rowell to recover the amount due on two promissory notes, to the May Term, 1857, of Baker Superior Court. The death of the defendant having been suggested at the next Term, the plaintiff then proceeded to sue out *scire facias* against, and had the same served on, George W. Lawrence, as executor *de son tort*, requiring him to show cause at the following Term why he should not be made a party defendant as the executor *de son tort*.

At the succeeding Term, no cause being shown to the contrary, the Court passed an order making said George W. a party defendant, "as the executor of the last Will and Testament of Lawrence G. Rowell, deceased." And at the

same, viz: May Term, 1858, said George W., as executor of Lawrence G., confessed judgment to the plaintiff. Judgment having been entered up, and a *f. fa.* issued thereon against him as executor generally, the said George W. paid plaintiff's attorney \$300, in part satisfaction of the same; which amount was entered as a credit on said *f. fa.* In July, 1859, the Sheriff, of said county levied said *f. fa.* for the balance due thereon, upon certain parcels of land as the property of Lawrence G. Rowell, deceased.

At the November Term, 1859, a motion was made by defendant to set aside the judgment obtained as aforesaid. The Court granted the motion, and passed an order vacating the same.

The bill of exceptions states that counsel for plaintiff had no notice of said motion, but was in Court at the time it was granted.

At the May Term, 1860, counsel for plaintiff moved a rule requiring the defendant to show cause why the former order should not be vacated.

The Court, after argument, refused the rule, and counsel for plaintiff excepted, and assigns the same as error.

LYON, for plaintiff in error.

SLAUGHTER & ELY, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This suit was originally brought against Lawrence C. Rowell, the maker of the note upon which the action is founded. He dying, a *scire facias* was issued and served upon George W. Rowell as *executor de son tort*, calling upon him to show cause why he should not be made a party defendant. Upon the return of the *scire facias*, and George W. Rowell showing no cause to the contrary, he was, by the judgment of the Court, "made and constituted party defendant as the executor generally of the last Will and Testament of Lawrence G. Rowell, deceased." And the plaintiff was directed "to proceed with said cause against the said George W. Rowell as executor as aforesaid."

At the same Term of the Court to which he was made party, George W. Rowell confessed judgment for the plain

Shotwell vs. Rowell.

stiff, demand, signing himself "George W. Rowell, as executor of L. G. Rowell." Upon this confession, a judgment was entered against the goods and chattels, rights and credits of Lawrence G. Rowell, executor generally, and execution issued in the same way. Three hundred dollars was collected of George W. Rowell on the *fi. fa.* It was then levied on land belonging to L. G. Rowell, when, upon motion, it was by the Court set aside, upon the ground that the judgment was rendered against George W. Rowell, as executor in his own wrong. And for the same reason, the Court refused to vacate this order.

It will be seen, by reference to the proceedings, which we have set out with some particularity, that the Court was mistaken in point of fact. Upon the return of the *scire facias*, George W. Rowell was made a party as executor generally. He confessed judgment as such, and the judgment and execution went against him as executor generally, and not as executor *de son tort*. The Judge rescinded his order, as to the judgment and *fi. fa.* in favor of Elijah Pearce, as administrator of James G. Johnson, that being against George W. Rowell, as executor generally. He should for the same reason have rescinded his order, as to this case. And no doubt had not the fact been overlooked, that they both stood upon the same footing, he would have acted consistently with himself. In point of fact, there seems never to have been any legal representative on the estate of L. G. Rowell. George Rowell assumes to manage as one having authority, and perhaps he has from the parties in interest, but not from the ordinary.

I hope the day is past, anyhow, when the rights of parties are to turn upon the addition or omission of the cabalistic overbush *de son tort!* *De son fiddle-stick!* It may be of assistance whether one is rightful executor. But away with *son tort* as the test of anything.

The presiding Judge certifies, that the counsel of Shotwell was in Court when he passed the order annulling his client's judgment. But he does not undertake to say that he had notice and knowledge of the proceeding; and this was indispensable. For if counsel and parties are to be held responsible for what is transacted in Court, it will not do to say that it was stood by at the time and did not interfere, which is flatly contradicted in this case. Notice should be brought home in some

The Water Lot Company vs. Leonard.

more abiding form than the mere recollection of the incumbent on the Bench for the time being. Rights should not rest on so frail a tenure.

THE WATER LOT COMPANY vs. LEONARD.

1. Apparent defects in a declaration that could be cured by amendment, are not material.
2. The Water Lot Company sold to Van Leonard, in trust for the Howard Manufacturing Company, a water lot, No. 11, in which were various covenants. In one place, in one of the deeds between the parties, Van Leonard was styled trustee of the Howard Manufacturing Company; in another, trustee of the stockholders of the Howard Manufacturing Company. In the deeds there were various covenants: among others, after stipulating how the canal or reservoir was to be finished, the waste-way not being considered sufficiently deep to carry off the waste water from the machinery, the Water Lot Company agreed to blast out the waste-way opposite to lots 13, 14, 15, the Howard Manufacturing Company to blast out opposite 11 and 12, all being below 11, on which the Howard Manufacturing Company intended to put up machinery. There was this further stipulation: That the Water Lot Company would "so finish all the eyes in the canal or reservoir as to furnish and contain in said canal water in sufficient quantity to propel the machinery placed and erected on lot No. 11, by Leonard." After erection of buildings, &c., on the lot, the whole property was sold at Sheriff's sale, as the property of the Howard Manufacturing Company. On an action brought by the Howard Manufacturing Company for breach of covenant and injuries sustained by the Howard Manufacturing Company prior to the sale, one Parr, who held an interest in the property under the purchaser at each sale was offered as a witness: *Held*,
 1. That Parr was not interested in the result of that suit, and competent.
 2. That the styling of Van Leonard in the one as trustee for the Howard Manufacturing Company, and in the other as trustee for stockholders of the Howard Manufacturing Company, was immaterial, and explained itself.
 3. That the Water Lot Company did not covenant against low water, or to supply the machinery with water at all events, but the parties contracted on the basis that if all the covenants were performed as stipulated, in regard to canal, waste-way and eyes, that a sufficiency of water would be supplied.

The Water Lot Company vs. Leonard.

1. That the mutual covenants as to blasting and blowing out the race or waste-way, were independent, and not dependent, they going to a part, and not the whole of the consideration.
2. That the measure of damages was the interest on the investment for the time the machinery was not employed for want of water; and in case only a part of the machinery was idle, interest on a like proportion of the investment.
3. That the plaintiff is not compelled to expose himself to a trespass to protect the defendant from the consequence of his breach of the contract.
4. When the verdict is sustained by the proof, the case will not be sent back for an immaterial error in his charge of the Court.

Covenant, in Muscogee Superior Court. Tried before Judge WORRILL, at November Term, 1859.

This was an action brought by Van Leonard, trustee of the Howard Manufacturing Company, against The Water Lot Company of Columbus, alleging that the defendant sold plaintiff lot of land No. 11, on Bay street, in the city of Columbus, Georgia, near the Chattahoochee river; that at the time of said sale, said parties, among other things, covenanted as follows:

"That the building or buildings which might be erected by the said Van Leonard, trustee as aforesaid, his heirs and assigns, on said lot, No. 11, should be fire-proof outside, and should be placed equi distant from the north and south lines of said lot, and should not exceed fifty feet in width, so that there should be an open space and uncovered of eleven feet of ground between the walls of said buildings and said boundary lines of said lot. And further, that the said lot, No. 11, either in the hands of Van Leonard, trustee as aforesaid, or his heirs and assigns, should be made permanently chargeable with one-nineteenth part of the expense of repairing the dam across the said river, (Chattahoochee,) and said canal or reservoir; and it was also covenanted and agreed at the time and place aforesaid, on the part of said Water Lot Company, with the said Van Leonard, trustee as aforesaid, his heirs and assigns, that the said Company would not bargain and sell any of the lots undisposed of to any person or persons, except upon condition that the building or buildings which might be erected should be equi distant from the boundary lines, as hereinbefore expressed. And further, that the said Van Leonard, trustee as aforesaid, his heirs and

The Water Lot Company vs. Leonard.

assigns, should be entitled to use the water commanded by said dam across the river, and said canal and reservoir, in proportion to the number of lots in said survey now improved, or which might hereafter be improved, and when all of said lots, to-wit: nineteen in number, should be improved, the said Van Leonard, trustee as aforesaid, his heirs and assigns, should be entitled to use one-nineteenth part of all the said water commanded by the said dam and canal; which water was to be taken from said canal and conducted across the water passage, or waste-way, in flumes, or aqueducts, in such manner as not to impede or obstruct the passage of the water through said waste-way from the machinery above said lot, 11. And it was further covenanted and agreed at the time and place aforesaid, on the part of said Water Lot Company, with said Van Leonard, trustee as aforesaid, his heirs and assigns, that the said Company would not erect, or grant the privilege to others of erecting, on any of said water lots, from lot No. 1, on which the Factory, then in operation, was standing, to lot No. 19, any building or buildings other than such as might be fire-proof outside, as before prescribed for the manner of construction of the building by said Van Leonard, trustee as aforesaid on lot No. 11. And it was covenanted on the part of Van Leonard, trustee as aforesaid, that he would not erect on lot 11 any fixtures for the purpose of sawing logs." And by another deed between the same parties, it was further covenanted as follows:

"And whereas, the said Water Lot Company had constructed a dam across the Chattahoochee river opposite to said city of Columbus, and also a basin, or canal, which said basin was not then (at the date of the former deed) fully completed, and for the consideration mentioned in said indenture, the said Water Lot Company did covenant and agree with the said Van Leonard, trustee as aforesaid, to finish said basin, or canal, in the following manner, to-wit: That the top of the western wall of said canal should be laid with large rock and bolted together with substantial iron rods and cemented with hydraulic cement for the distance of one hundred and fifty feet from the present dam across the river, and that the whole of the then unfinished part of said western wall above water, for fifty feet from said dam should be laid in good lime mortar, and that the west end of the west wall of said canal should be finished with a wall

bling dam, having an angle of forty-five degrees, made of sufficiently large timbers, covered with plank three inches thick, extending from the present dam down the said western wall for one hundred and fifty feet, or to the ferit-eye in said wall, and that the said timbers supporting said plank should be bolted at the top and bottom with iron rods. And said Water Lot Company did further covenant and agree to blast and blow out said race, or waste-way, opposite to lots Nos. 13, 14, and 15, to the width of 60 feet, and to the then depth of said race, or waste-way, opposite to each or any of said lots. And the said Leonard, trustee as aforesaid, did, on his part, covenant to blast out said race, or waste-way, opposite to lots Nos. 12 and 11, to the same width and depth as aforesaid. And said Water Lot Company did further covenant, on the day and year aforesaid, with said Van Leonard, trustee as aforesaid, so to finish all the eyes in the canal, or reservoir, as to furnish and contain in said canal water in sufficient quantity to propel the machinery placed and erected on lot No. 11 by Leonard, trustee as aforesaid, his associates and assigns.

The declaration, after stating these covenants, then closed, as follows: "And although said plaintiff has well and truly performed and fulfilled all and singular the covenants and agreements in the said deed of indenture mentioned on his part, and behalf to be done and performed, yet the said defendant has not performed and fulfilled the covenants mentioned on the part of said defendant to be done and performed. And the said plaintiff in fact says that at the time and place aforesaid, after the making of said indenture, the said defendant did not blast and blow out the race, or waste-way, opposite to the lots Nos. 13, 14 and 15, to the width of 60 feet and to the depth of said race, or waste-way, opposite to each or any of the said lots, as by the said covenant the said defendant was bound to do; and though requested since that time to do and perform the said covenant according to the obligation of said indenture, the said defendant did not, or would blast or blow out said race, or waste-way, opposite to the lots Nos. 13, 14 and 15, to the width of 60 feet and the then depth of said race, or waste-way, opposite to each any one of said lots, but wholly neglected and refused so to do; so that the said covenant of the said defendant remains unperformed, whereby the water of the said waste-way

The Water Lot Company vs. Leonard.

is unable to escape, and has been ever since the making of said indenture, and still is backed against the wheel erected by the plaintiff on lot No. 11, for the propulsion of machinery, so that the same is rendered almost useless to the plaintiff for the purpose of propelling machinery. And the said plaintiff further says, that at the time and place aforesaid, after the making of said indenture, the said defendant did not finish all the eyes in said canal in said indenture mentioned, or reservoir, in such manner as to furnish and contain in said canal water in sufficient quantity to propel the machinery placed and erected on lot No. 11 by said plaintiff, trustee as aforesaid, as by the said covenant the said defendant was bound to do; and although often requested by said plaintiff since that time to do and perform said covenant, the said defendant did not and would not finish all the eyes in said canal, or reservoir, in such manner as to furnish and contain in said canal water in sufficient quantity to propel the machinery placed and erected on said lot No. 11, but wholly neglected and refused to do so; so that the said covenant remains unperformed, so that the eyes in said canal do not furnish, and the said canal does not contain sufficient quantity of water to propel the machinery erected on said lot No. 11; and so the said plaintiff says that the defendant hath broken the said covenant with said plaintiff, and has refused, and still does neglect and refuse to perform the same to the damage of plaintiff, &c."

When this case came up for trial, counsel for defendant demurred to plaintiff's declaration on the grounds following:

1st. Because the Howard Manufacturing Company had no right to sue by a trustee.

2d. Because the deed set forth in the declaration shows Leonard to be trustee for the stockholders, and not for the Company.

3d. Because the declaration does not aver specifically that the plaintiff has done and performed his covenants to blast out the canal opposite to lots 11 and 12.

4th. Because the declaration does not aver that after lapse of a reasonable time defendant failed to perform the covenant.

5th. Because the declaration declares for damages on account of the erection of buildings, machinery, &c.

6th. Because the declaration does not aver any time when

The Water Lot Company vs. Leonard.

defendant was requested to perform its covenants, and does not aver an offer of plaintiff to perform his, or a readiness so to do.

The Court overruled the demurrer, and counsel for defendant excepted.

The plaintiff then offered in evidence the deed containing the first mentioned covenants in the declaration, which was signed by the President and Directors of the Water Lot Company. The defendant's counsel objected to the admission of the deed until an order should be shown authorizing the making thereof. The objection was overruled, and defendant excepted.

Plaintiff then offered articles of agreement executed in the same manner as said deed, and purporting to be made between the said Van Leonard, as trustee for the stockholders of said Manufacturing Company of the one part, and the said Water Lot Company of the other part.

Defendant objected to the paper being read in evidence on the same ground urged against said deed; and further, because it varied from plaintiff's declaration, and because the covenants therein were between different parties from those in the deed.

The Court overruled these objections, and defendant's counsel excepted.

Plaintiff then introduced Mr. Parr, who, on his *voir dire*, stated, that he purchased from the purchaser at Sheriff's sale, an interest in the Howard Manufactory, and was now a part owner of lot No. 11, (the property of the Howard Manufacturing Company having been all sold at Sheriff's sale.) Defendant objected that the witness was interested, and therefore incompetent.

The Court overruled the objection, and defendant excepted.

Plaintiff then proposed to prove by Mr. Parr the value of the house and machinery erected on lot No. 11, and also the value of an operative house erected by the Howard Manufacturing Company on another lot, plaintiff's counsel stating that they expected to connect this value with the value from 1848 to 1852, and to prove that the witness was an expert.

Defendant objected to the evidence. The objection was overruled, and defendant excepted.

Mr. Parr, after stating that he was an expert, testified, that in June, 1855, the building and machinery on said lot

The Water Lot Company vs. Leonard.

were worth one hundred and twenty thousand dollars, and the operative house. He was also permitted to testify, defendant objecting, that in his opinion, if the canal opposite lots 12, 13, 14 and 15 had been blasted out as deep as the bottom opposite lot 11, all the machinery of the Howard Manufacturing Company could have been run either in high or low water. He also testified, defendant objecting, that at the time he went to the Factory, they had one Morris wheel to turn the machinery; that with an ordinary head of water, that wheel would, in his opinion, run all the machinery, and that in low water, with the obstructions in the canal, that wheel would not run more than two-thirds of it. He testified, that in 1855, a new wheel was added; that the race opposite No. 12 is not blasted out, and that it would have been of little or no benefit to the Factory to blast out opposite 13, 14, 15 and 16, unless opposite 12 was also blasted.

J. R. Brown testified for plaintiff, defendant objecting, that in 1849 the probable cost of the machinery and Factory was one hundred and twenty thousand dollars; that with sufficient water, all the machinery could have been run—an ordinary head of water would have given sufficient speed; that for three or four months of the summer or fall of 1851, there was not water enough to run any of the machinery of plaintiff. He further testified, that the Morris wheel required a great deal more water than some other kinds of wheels.

James Welch testified for plaintiff, defendant objecting, that in 1848 there was not as much machinery in the Factory by about one-half as in 1849, and that from 1849 to 1852 there was but little change, if any, in the amount and value of machinery therein, but he did not know the value of it; the building was worth from twenty to twenty-five thousand dollars; that for two months in 1849, about one-third of the machinery could not be run on account of low water, and that such was the case also in 1850.

John G. Winter testified for plaintiff, defendant objecting, that there was but little increase in the machinery from 1849 to 1853; that in 1849, 1850 and 1851, whenever the water got low, a part of the machinery had to be stopped; that in his opinion, the eyes at the mouth or opening of the race (they were known as flood-gates, and not called eyes) were too small; they were opened larger, and finally the race

mouth opened in 1849, and then the water flowed into the canal more freely; there were also some loose rocks near the mouth of the canal obstructing some little the free flow of water.

The plaintiff, after introducing other evidence not objected to, closed his case.

Mr. Cockran, introduced by defendant, testified, amongst other things, that the Howard Factory building was in the canal opposite lot 11; that is, over the line of the lot about five feet.

Objection being made to this evidence, the Court stated that he would admit it for the purpose only of showing that thereby the defendant was less able to perform his covenants. To which decision the defendant excepted.

The defendant then offered in evidence a deed to lot 11 from Van Leonard to the Howard Manufacturing Company, dated April 30, 1852, consideration five dollars, plaintiff objecting. The Court rejected the evidence and defendant excepted.

The Court charged the Jury as follows:

"It appears that the defendant, by contract in evidence, agreed to finish all the eyes in the canal or reservoir so as to contain and furnish a sufficiency of water to run all the machinery of plaintiff to be put on lot 11, and also to blast out the rock opposite lots 13, 14 and 15 sixty feet wide and as deep as the old canal. It was the defendant's duty to so finish the eyes or to so construct the race as to furnish and contain, at either high or low water, a sufficiency of water to run with proper speed all the machinery that the plaintiff put on lot 11. If the defendant failed to finish or to so construct the eyes or canal as to contain sufficient water to run plaintiff's machinery, then there is a breach, and plaintiff is entitled to recover. If it is your opinion, from the evidence, that the defendant did not so finish the eyes or construct the canal as to furnish and contain a sufficiency of water to run plaintiff's machinery at all times, you will then find whether on account of this the plaintiff has been injured, and if so, will estimate the damages as follows: You will find the value of the Factory buildings and machinery; you will then find how much of the time, on account of the above, plaintiff has been unable to run the whole or any part of said machinery. If such be the fact, you will allow the plaintiff;

The Water Lot Company vs. Leonard.

as damages for this, the interest on the value of his investment, or any part thereof which plaintiff could not employ or use on account of this failure of defendant, if there was a failure. Further, that if they (the Jury) believe the defendant had not blasted out the canal according to his contract in evidence, and the plaintiff had been injured thereby, then the plaintiff was entitled to damages for this, to be estimated by the same rule as above stated."

The Court also charged, that "the defendant insisted that if the plaintiff could not run his machinery, it was not the fault of defendant, but was on account of plaintiff's defective wheel; that the plaintiff was not bound to get the best wheel, but an ordinary one—a common one—not the best; if plaintiff did not get the best wheel, but one that would have answered, that is no defence; if the wheel was not any account, plaintiff cannot recover; if it was such an one as could have been driven with the proper quantity of water, then that is no defence."

To each and all of the foregoing charges defendant's counsel excepted.

The defendant requested, in writing, the following charges:

1st. If the Jury believe that the defendant has failed to blast and blow out the canal or race according to their covenants, then the measure of damages for this breach is what it would cost to perform the work; and if the plaintiff has not shown this, he cannot recover for this.

2d. If the Jury believe from the evidence that the eyes of the canal or reservoir were so finished as to furnish and contain water sufficient to propel plaintiff's machinery on lot 11, and if they further believe from the evidence that still there was not, in low water, sufficient to run the machinery, the plaintiff cannot recover for this cause.

3d. That under the deeds in evidence, defendant was not bound, under all circumstances, to furnish the plaintiff with sufficient water to run their machinery, and if they believe the want of water was not occasioned by any defect in the eyes of said canal, the plaintiff cannot recover for this.

4th. That unless the Jury believe from the evidence that the plaintiff has performed and kept his covenant to blast and blow out opposite lots 11 and 12, or has shown a sufficient excuse for not so doing, then he cannot recover of the defendant for failing to blast out opposite 12, 14 and 15. . .

The Water Not Company vs. Leonard.

5th. That if the Jury believe the defendant did, within a reasonable time, blast and blow out the race-way opposite to lots 13, 14 and 15, according to the covenant, and that the eyes in the canal or reservoir were so finished as not to allow any material quantity of water to escape from the canal or reservoir, then the plaintiff cannot recover.

6th. If the Jury believe from the evidence that the canal, was blasted out opposite lots 13, 14 and 15, in accordance with the covenant before the plaintiff blasted out opposite 12, and that the eyes in the canal were so finished that a small and immaterial quantity of water escaped from the canal, then the plaintiff cannot recover.

7th. If the Jury believe that the canal or race opposite lots 13, 14 and 15 was not blasted out in a reasonable time, still, if they believe it was done before plaintiff blasted opposite lot 12, and that it would have been of no benefit to plaintiff to blast out opposite 13, 14 and 15, unless 12 was also blasted out, then plaintiff cannot recover for this failure.

8th. That although the Jury may believe that, in low water, the plaintiff could not run more than two-thirds of his machinery, yet, if the Jury believe that the canal opposite lot 12 was not blasted out, and that if that had been blasted out and below this had also been blasted out, then the plaintiff could have run all his machinery even in low water, then plaintiff cannot recover for loss in low water.

The Court refused to give any of said charges as requested, and defendant's counsel excepted.

Defendant then requested the Court to charge: "That if, the Jury believe that the plaintiff furnished his factory with a wheel which was a poor one, and one not calculated to economise water or power, and that other wheels could have been procured that would have performed twice as well, and that it was on this account that plaintiff could not run his machinery in low water, then plaintiff cannot recover for this loss."

The Court charged as requested, and added: "That plaintiff was not bound to get the best wheel, but only an ordinary, common one."

To the qualification thus made by the Court, defendant's counsel excepted.

The several rulings and charges of the Court excepted to by defendant are now assigned as error by his counsel.

The Water Lot Company vs. Leonard.

During the progress of the trial, the plaintiff proposed to prove the capability of the machinery in the Factory under a head of water sufficient to run all the machinery; also, the loss of capacity in consequence of the deficiency of water; also, that plaintiff had a sufficient number of hands to propel his machinery, which hands they discharged for want of water power sufficient to employ them; also, the daily loss incurred thereby on the profits which he would have derived from his manufactures, had he been able to run his machinery. Defendant objecting to this evidence, it was rejected by the Court, and plaintiff excepted.

Plaintiff then offered to prove the value of said Factory, with a sufficiency of water power throughout the year to propel its machinery, and the value of said Factory with the water power in fact supplied. This evidence was also rejected by the Court.

Counsel for plaintiff now assign the two last named rulings of the Court as error. Both bills of exceptions argued together.

WM. DOUGHERTY and R. J. MOSES, for VAN LEONARD.

JOHNSON & SLOAN, and R. W. DENTON, *contra*.

By the Court.—LYON, J., delivering the opinion.

1. There is nothing in the first and second grounds of demurrer; because, if the declaration was defective—and we do not think it was—the objections could have been cured by amendment.

The 3d, 4th, 5th and 6th grounds of demurrer are involved in the charge of the Court as given, and in the refusal to charge on the request of counsel.

2. The witness, Parr, was competent. The fact that he owned an interest in the property did not affect him with interest. The property had been sold at Sheriff's sale, as the property of the Howard Manufacturing Company, and Parr held an interest under the purchaser at that sale. That was carried with it the covenant of the Water Lot Company to the Howard Manufacturing Company, and would enable the purchaser at such sale to recover for all injuries resulting from a breach after the sale, but the damages resulting to

The Water Lot Company vs. Leonard

the Howard Manufacturing Company for breaches prior to the sale, did not pass to the purchaser by the sale; therefore the purchaser at Sheriff's sale, nor any one holding under him, could have any interest in the recovery in this suit, for this action is for damages resulting from a breach of covenant prior to the Sheriff's sale.

8. The objection to the introduction of the deeds of 9th July, 1857, on the ground of discrepancy, was not well considered by counsel. Van Leonard is called in the first, in one place, trustee of the Howard Manufacturing Company, and in the same deed, in another place, trustee of the stockholders of the Howard Manufacturing Company, which shows that the same Company was referred to and intended in both cases, and if there was an apparent discrepancy, it explains itself; it certainly did not vitiate the deed. Besides, Van Leonard held the legal title in any event.

We understood the counsel for plaintiff in error, as not insisting upon the objection to these deeds, for the want of an order to show that the persons who signed the deeds were authorized to make them, as no plea of *non est factum* had been filed, putting that fact in issue.

The remaining objections to the evidence—and they are numerous, for I believe everything was objected to by defendant's counsel, even to testimony offered by themselves—were involved in the rulings of the Court in his charge to the Jury, and may be all considered together. The same may be said of the points of error complained of by the Howard Manufacturing Company in the cross bill of exceptions brought up by them.

The breaches assigned by the plaintiff in the Court below, in his declaration, were—

1st. That the Water Lot Company did not blast and blow out the race, or waste-way, opposite to lots 18, 14 and 15, to the width of sixty feet, and to the then depth of the race-way opposite to each or any of the other lots, as by the covenants they were bound to do.

2d. That the said Company did not finish all the eyes in said canal, or reservoir, in such manner as to furnish and contain in said canal water in sufficient quantity to propel the machinery placed and erected on said lot 11 by the plaintiff, by reason whereof damage resulted.

There was much discussion as to what was the true sense

The Water Lot Company vs. Leonard.

struction of the covenant in that part on which the second breach is assigned.

4. We think the true interpretation is, that if the canal was completed, and the eyes, or gates, at the mouth of the canal were so finished or constructed as to permit the water from the river to flow freely and without interruption into the canal, and the balance of the eyes so finished as to prevent the escape of the water from the canal, except as intended it should, and the race, or waste-way, was blasted out—all of which the Water Lot Company covenanted they would do—except as to blasting out the race, or waste-way, opposite to lots 11 and 12, which the Howard Manufacturing Company covenanted they would do, that, then, the canal *would* furnish and contain sufficient water to propel the machinery, &c. There was no covenant against great drought or unusual and excessive low stages of the water in the river.

The whole of the questions made upon the pleading, other than what I have disposed of, the evidence and the charge and refusal to charge by the Court, may be reduced to two, for to that were they narrowed in the argument, and they are—

1st. Was it necessary for the plaintiff to aver and prove that they had perfored their part of the covenants; that is, to blast and blow out the race, or waste-way, opposite to lots 11 and 12 before they could recover against the defendants for their breaches of the covenants by them?

2d. What is the measure of damages for the injuries sustained by plaintiff in consequence of the breaches?

5. Upon the first question we had great difficulty; in fact, were so unfortunate as at last not to be able to agree upon it. The whole difficulty lies in that knotty question, Whether the covenants are dependent or independent? If they are dependent; that is, if each depends on the other, the failure of the one annuls and destroys the other. Now, the proof here is, that it would not benefit the plaintiff to blast out the race-way opposite lots 13, 14 and 15, unless the race-way opposite lot 12 was also blasted out, for their machinery is on lot 11, which is above all of them, and the waste water would be equally poured on their wheel from the obstruction opposite lot 12, as that of 13, 14 or 15, or vice versa. If there was nothing between these parties; that is, if there was nothing in the agreement or deed but this part of the cove-

nant, I should say the covenants were concurrent. To determine what is a proper construction, has always been an extremely vexed question with the Courts. I will, as briefly as possible, state some of the rules that bear on the point, that Courts have laid down to determine whether the covenants are dependent or independent:

"When the agreements go to the whole of the consideration, on both sides, the conditions are dependent, and one of them is a condition precedent to the other. If the agreements go to a part only of the consideration on both sides, and a breach may be paid for in damages, the promises are so far independent." *Par. on Con.*, 2 vol., 189. "Or if this dependence is not mutual, but one of them rests upon the other by a dependence which is not equally shared by the other; if that contract upon which this dependence rests, is broken and defeated, the other, by reason of its dependence, is annulled and destroyed also." "But they may be wholly independent, although relating to the same subject, and made by the same parties, and included in the same instrument. In that case, they are two separate contracts. Each party must, then, perform what he undertakes, without reference to the discharge of his obligation by the other party. And each party may have his action against the other for the non-performance of his agreement, whether he has performed his own or not." The mutual covenants must go to the whole consideration on both sides, when the one is precedent to the other, but when they go to a part only, and a breach may be paid for in damages, the covenants are independent. The leading case on this point, is of *Boon vs. Eyre*, 1 H. Blk., 278. The plaintiff in that case conveyed to the defendant the *Equity of redemption* of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 per annum for life, and covenanted that he had good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff well and truly performing all and everything on his part to be performed, he, the defendant, would pay the annuity. The action was brought for the non-payment of the annuity. Plea: That the plaintiff was not, at the time of making the deed, legally possessed of the negroes, and so had not a good title to convey. General demurrer to the

The Water Lot Company vs. Leonard.

plea—Lord MANSFIELD: "The distinction is very clear: When mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but when they go only to a part, when a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea be allowed, any one negro not being the property of the plaintiff would bar the action." "So, when it was agreed between C. and D. that in consideration of £500 C. should teach D. the art of bleaching materials for making paper, and permit him, during the continuance of a patent, which C. had obtained for that purpose, to bleach materials according to the specification, and C., in consideration of the sum of £250 paid, and the further sum of £250 to be paid by D. to him, covenanted that he would, with all possible expedition, teach D. the method of bleaching such materials, and D. covenanted that he would, on or before the 24th February, 1794, or sooner, in case C. should before that time have taught him the art of bleaching such materials, pay to C. the further sum of £250. In covenant by C. against D., the breach assigned was the non-payment of the £250. Demurrer: That it was not averred that C. had not taught D. the method of bleaching such materials; but it was held by the Court that the *whole* consideration of the agreement being that C. should *permit* D. to *bleach materials*, as well as *teach* him the method of doing it, the covenant by C. to teach was but *part* of the consideration for a breach which D. might recover a recompense in damages, and C., having in part executed his agreement by transferring to D. a right to exercise a patent, he ought not to keep that right without paying the remainder of the consideration, because he may have sustained some damage by D.'s not having instructed him, and the demurrer was overruled. *Campbell vs. Jones*, 6 T. R., 570; *Stover vs. Gordon*, 8 M. & S., 200; *Bitchie & Atkinson* 10 East, 295; *Hancock vs. Hadden*, *Ibid*, 555. See also note C., 2 Par. on Con., 41, and cases cited. See also note by *Williams to Perdue vs. Oak*, 1 Sanders, 819. In this note, which is a very elaborate one, nearly all the English authorities on the subject are collected and cited, and they are very numerous; by an examination of which it will be seen that there are three kinds of mutual covenants that are concurrent and dependent

They are—1st. When two acts are to be done at the same time; 2d. When they go to the whole consideration; 3d. When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c.

The cases of mutual covenants that are independent, are of two kinds: one I have named, and the other is, if a day be appointed for payment of money, or part of it, or for doing any other act or thing, and the day is to happen, or may happen before the thing which is the consideration of the money or other thing is to be performed.

Now, let us compare this case with these rules, and see to which class it belongs: There is nothing in the agreement requiring the two acts, which are of the same kind, in the one case, to be done at the same time; there is no dependence upon each other in that respect. The thing to be done by the defendant may as well happen before the thing to be done by the plaintiff as not; there is no dependence there. The mutual covenants to be performed, which form the subject of controversy, do not go to the whole consideration of the covenant, but to a very small part of the same. There is, therefore, no dependence in any one of the three respects; but they fall directly within each of the two classes of independent covenants. They are, too, within the reason of independent, rather than of dependent covenants. There is no equality in the damage sustained by the plaintiff and defendant, which is a thing greatly looked to, and a very controlling one, and, in my opinion, it is the truest test of all others. For instance, the damage sustained by the defendant in the action is only the cost of blasting out the race-way opposite lot 12, while the damage to the plaintiff is the suspension of one-third part of his machinery for a long space of time, and a total suspension of all his machinery for several months. Besides, there is another breach of the covenant by the defendant, which forms a very serious ground of complaint, and that is the failure to so finish the gates, or eyes, as they are called in the covenant, at the mouth of the canal, that the water could flow freely into the canal and without interruption. These openings were not only not properly constructed, but there were rocks in the mouth of the canal obstructing the passage of the water.

The most serious difficulty is one that is not reached by

The Water Loo Company vs. Leboard.

any of the rules of construction that I have mentioned, or that is known to the books, so far as I have been able to find, and that is the fact, that it would have done the plaintiff no good to have blasted out the waste-way opposite 18, 14 and 15 until it was blasted out opposite 12. My answer to it, however, is this: That it was unnecessary for the plaintiff to go on and blast out the waste-way opposite lot 12 until he saw that it would avail himself; for if he had gone on to do this work, it would have increased his expenses and damages, and accomplished nothing. And how can this avail the defendant? He has committed the breach of his covenant in two ways, both of which damaged the plaintiff. How can he say that there was no use in my doing this work, as the plaintiff has not done his? The work to be done by the plaintiff may have been a very small matter; it was only one-third of what defendant had to do. But whether the one way or the other; whether my answer is satisfactory or not, the authorities I have referred to are plain and clear, that the covenants are not dependent, but independent, and for the respective breaches action will lie by each, and that reason is unanswerable. And for that reason, we hold that the Court below was right in ruling, that the plaintiff need not aver and prove performance of the condition on his part to be performed in order to entitle him to maintain his action for the breaches of the defendants.

Neither party was satisfied with the rule of damages laid down by the Court. The defendant insisted that if the plaintiff was entitled to recover anything at all, it was only what would have been the cost of blasting, or blowing out the race-way finishing gates at the mouth of the canal, for the free passage of the water, according to his contract; that the plaintiff had the right to go upon the premises and do the work himself, and so prevent such disasters to himself, and it was his own wilful neglect not to do so.

The plaintiff, on the other hand, insists that he had a right to recover, not only all that he actually lost by the failure of the defendant to perform his contract, but all that he would have made had he been able to employ all his machinery: that is, that he was entitled to recover the profits he might or could have made from the use of all his machinery, from which he was prevented by the failure of defendant to comply with his contract. For this purpose he offered proof of the

capability of the machinery, under sufficient head of water, also, the loss of capacity by the want of a sufficient head of water, the daily loss sustained in the profits which they would have derived from the employment of all the machinery, and the value of the machinery with a full head of water, and its value with such a head of water as existed.

6. The Court rejected both, holding that neither was the true measure of damages to be recovered; but that the plaintiff was entitled to recover the actual damage sustained, and that, in this case, was the interest on the value of his investment, or such part thereof as he could not employ on account of the failure of defendant, for the time that such part or the whole could not be so employed; for instance, if the whole machinery was idle in consequence, then the plaintiff could recover interest on the whole investment; if there was only a part of the machinery in action for the want of water, then interest on that portion of the investment.

We think the Court adopted the only safe and certain rule of damages that would fit the case. The rule is in accordance with that laid down by this Court in *Coweta Falls Manufacturing Company vs. Rogers*, 19 Ga., 416. What the profits might have been, had the plaintiff been able to employ the whole of his machinery all the time, was a matter purely of speculation, depending on the demand, sales, costs, &c., and was properly rejected.

The profits that are recoverable, are such as are the immediate fruit of the contract, and are independent of any collateral engagement or enterprise entered into in expectation of the principal contract. 2 *Par. on Contract*, 461. Such was the effect of the decision in *Masterton vs. Mayor of Brooklyn*, 7 Hill, 61, and other cases to which we have referred. To give a familiar instance: If one agrees to deliver a quantity of bacon at a given day and place for a specified price, and fails, then, whatever profit there is in the transaction at the time when the contract is to be performed, is the measure of damages. That there may be found cases in conflict with this holding, I do not doubt; but the rule once laid down by this Court, must be adhered to.

7. Neither was the cost of blasting out the race, or waste-way, any criterion for a measure of the damages. The race, or waste-way, opposite to lots 13, 14 and 15 belonged to the defendant, and the plaintiff had no right or permission to

Strozier vs. Howes, Hyatt & Co.

water thereon to do that work. To have done so would have been a trespass on his part, to which the Law will not expose him to protect the defendant from the performance of this contract.

8. We are induced to think that the Court, in his charge to the Jury, considered the defendant as having covenanted against low water in the river, or rather, that his undertaking was to furnish the plaintiff with sufficiency of water to propel his machinery in all events. If so, the Court erred, according to our construction of the covenants, as already explained; but as the proof was very clear, that there would have been sufficient water to run the machinery at all times during the total and partial suspension, had the race-way been blasted out, and the obstructions in the mouth of the canal removed, the error was immaterial. And for these reasons, we affirm the judgment.

STROZIER (next friend) vs. HOWES, HYATT & Co.

1. In the exercise of the jurisdiction confided respectively to the State Courts and those Courts of the United States, (where the latter have not appellate jurisdiction,) it is plain, that neither can have any right to interfere with, or control the operations of the other. It accordingly has been settled, that no State Court can issue an injunction upon any judgment in a Court of the United States, the latter having an exclusive authority over its own judgments and proceedings.

In Equity, from Dougherty Superior Court. Decision by Judge ALLEN, June Term, 1860.

Ann E. Nix, by her next friend, filed her bill in Equity, alleging, among other things, that the defendants in error had caused *f. fas.* to be levied upon certain property, and property of Samuel H. Nix, which belonged to him as true

Strozier vs. Howes, Hyatt & Co.

tee for her, under and by virtue of a marriage settlement, &c. The bill prayed for an injunction restraining the sale of said property, which was accordingly granted.

Subsequently, the defendants filed answers exhibiting the *f. fas.* referred to in the bill, as having been levied on the property in question; when it appeared that said *f. fas.*, being two in number, issued out of the Sixth Circuit Court of the United States for the Southern District of Georgia, upon judgments therein obtained. It also appeared by said answers, that the plaintiffs therein resided out of said State.

On the coming in of the answers showing these facts, counsel for defendants moved to dismiss said bill for want of jurisdiction. Which motion the Court granted on that ground, and counsel for complainant excepted.

STROZIER, for plaintiff in error.

HINES & HOBBS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question in this case is, Can the State Courts restrain, by process of injunction, executions issuing from the Circuit Court of the United States? And this doctrine is too well settled to admit of doubt.

Mr. Justice STORY says: "In the exercise of the jurisdiction confided respectively to the State Courts and those Courts of the United States, (where the latter have not appellate jurisdiction,) it is plain, that neither can have any right to interfere with or control the operations of the other. It has accordingly been settled, that no State Court can issue an injunction upon any judgment in a Court of the United States, the latter having an exclusive authority over its own judgments and proceedings." 3 *Story's Com. on the Constitution*, sec. 1751, citing *McKinn vs. Bookis*, 7 *Cranch.*, 279; 1 *Kent's Com.*, Ed. 19, p. 382 to 387; 2d Ed., 409 to 412.

And again, in section 1752: "No State Legislature or State Court can have the slightest right to interfere; and congress are not even capable of delegating the right to them."

On the other hand, the National Courts have no authority (in cases not within the appellate jurisdiction of the United States) to issue injunctions to judgments in the State Courts

Hargroves vs. Chambers.

or in any other manner to interfere with their jurisdiction or proceedings. 3 *Story's Com. on Con.*, sec. 1758; *Diggs v. Walcott*, 4 *Cranch.*, 178; 1 *Kent's Com.*, sec. 15, p. 301 (2d Ed., 321;) *Ex parte Cabrera*, 1 *Wash., C. C. Rep.*, 232; 1 *Kent's Com.*, sec. 19, p. 386 (2d Ed. 411, 412;) 8 *Wheaton*, 253.

And this is indispensably necessary to avoid collision between the two governments.

If this be a proper case for an injunction, application can be made to the Circuit Court of the United States where the judgments were obtained and from which the executions issued. If an ordinary case, trespass or trover can be brought.

HARGROVES, Executor, vs. CHAMBERS, et al.

The fourth rule of the sixth section of the charter of the Planters' & Mechanics' Bank of Columbus provides, that the total amounts of its debts shall at no time exceed three times the amount of the capital stock actually paid in over and above the specie actually deposited in its vaults for safe-keeping. In case of excess, the Directors were made personally liable for the same. On the 27th January, 1842, and 23d February, 1842, the Bank issued to George Hargroves two certificates of deposit, payable to his order on the certificates, with interest from date. The defendants are the only survivors of the then seven Directors: five are dead, four of them having represented fives with estates in the jurisdiction of the Court, and who could be joined in the suit. On the 12th June, 1843, a judgment of forfeiture and dissolution of said corporation was rendered by the Superior Court of Muscogee County upon proceedings instituted for that purpose, and directed by Acts of Legislature of 1840 and 1842. By the Acts, the judgment was to declare dissolution for all purposes except the right to collect and pay its debts, sell and convey its real and personal estate; the judgment contained no saving. On the 26th May, 1843, the Bank assigned all its property and of every kind to B. B. A. to pay debts, &c. The Legislature, in December 1843, passed another Act, relating that the process of forfeiture had

Hargroves vs. Chambers.

rendered "as provided for and contemplated by said Act," and assignment made, which was by that Act declared to be valid; the assets of the Bank, from neglect or waste of assignee, were lost. By the terms of the charter, the corporation was to continue until the 1st of January, 1857. Suit was brought against the defendants, as Directors, for the amount of the two certificates of deposits: *Held*—

1. That the plaintiff was not bound to join the representatives of the deceased Directors in the action against the survivor, although under the Act of 1819 he might do so.
2. That the certificates of deposits were not obnoxious to the Act of December 20th, 1837, "to restrain, prevent and make penal the paying away, &c., any bank bill, &c., intended and for circulation, &c., as paper money, having longer time than three days to run after its date before redeemable, &c., payable otherwise than in gold and silver."
3. That these certificates are such debts as are within the meaning of the fourth rule of the sixth section, for the excess of which Directors are liable.
4. That the loss of the assets of the Bank in the hands of the assignee, and from the neglect or waste of the assignee, did not relieve the Directors from their liability, but was the loss of the corporation.
5. That the liability of the Directors for these debts was a statutory liability, and not barred by time until after twenty years.
6. That the judgment of forfeiture did not extinguish the liability of the Directors.
7. That rights acquired under a temporary Statute are permanent and continue, notwithstanding the expiration of the law under which they were acquired, and that the liability of the Directors continued.
8. That the debts of the Bank were not extinguished by the expiration of the charter, nor the liability of these Directors.
9. That the liability of the Directors would not be affected, even if the debt was extinguished as to the Bank.
10. That the deed of assignment and saving in the Acts of 1842 and 1843 would have saved the debts and liabilities from extinguishment or destruction, even if that rule was in force.

Debt, from Muscogee county. Tried before Judge WORRILL, May Term, 1859.

George Hargroves, as executor of George Hargroves, deceased, brought his action of debt against the defendants in error, as the only surviving Directors of the Planters' & Mechanics' Bank of Columbus, to recover of them the sum of \$4,400 25, besides interest, deposited by deceased in his lifetime in said Bank, and which the defendants were liable to pay, as was alleged, on account of their violation of the char-

Hargroves vs. Chambers.

ter of said Bank, in this: that at the time of said deposit, the debts which said Bank then owed by bond, note, bill or other securities exceeded three times the amount of its capital stock actually paid in specie over and above the amount of specie actually deposited in the vaults of said Bank for safe-keeping.

The case was tried on the following agreed state of facts:

It is admitted that George Hargroves is the executor of George Hargroves, sen., deceased; that at the date of the certificates sued on, George Hargroves, deceased, deposited in said Bank the amounts of money therein specified, and said Bank, by its then President and Cashier, gave him the certificates sued on; that on the 2d day of June, 1842, payment of them was demanded of, and refused by, said Bank, and that the Bank was sued on then by said Hargroves, deceased, to the July Term, 1842, of the Inferior Court of said county, and judgment thereon rendered against the Bank; at the December Term, 1842, execution issued thereon, returned to the July Term, 1843, "no property;" that at the time of issuing said certificates, Chambers, Banks, A. H. Fluellen, W. B. Ector, J. C. Watson, Daniel McDougald and Thomas Berry were the Directors of said Bank, and that at the time of bringing this suit, they were all dead but Chambers and Banks, and that Fluellen, Ector, McDougald and Watson had representatives and estates in the county of Muscogee, but Berry had no representative in this State; that more than twelve months from the grant of their letters elapsed before suit brought; that at the date of said certificates of deposits, there was an excess of issue within the meaning of the fourth rule of the charter of said Bank sufficient to cover the amount of plaintiff's demand; that in 1843, a judgment was rendered in the Superior Court of said county forfeiting the charter of said Bank, but that no execution or other process has ever been sued out to execute said judgment, unless the Legislatures of 1840-'1-'2-'3 shall be construed by the Court to be such process, or to waive the necessity of any other execution of said judgment, if any such process was necessary.

It is also admitted that before this, Robert B. Alexander was, by a deed of said Bank, appointed the assignee of assets, and took possession of them; that these assets were sufficient, if they had been collected, to have paid the debt.

MACON, JUNE TERM,

Hargroves vs. Chambers.

f the Bank, but that they were not collected, and the debts were not paid; that the deed of assignment was executed by Board of Directors, who succeeded these defendants in office; that said deed was duly recorded, and that the assets conveyed in said deed of assignment could, by due diligence on the part of Robert B. Alexander, have been realized and collected, but were not collected, and were not applied to the payment of plaintiff's demand. It is admitted that said Alexander, Hargroves, sen., and plaintiff resided in the city of Columbus, Georgia, and that said Hargroves, sen., and plaintiff knew of said deed of assignment shortly after its execution, and that they did not prosecute a suit to subject said assets so conveyed to the payment of their said claim, further than to bring the suit mentioned above against the Bank and take the steps there stated.

It is further admitted that before and at the time of the commencement of this suit, the assets conveyed by said deed of assignment were barred by the Statute of Limitations, or otherwise lost or wasted by the assignee. Also, that the Act of incorporation, and all the Acts of the Legislature bearing upon the questions presented by the record of said case, and this agreement, be considered as in evidence, if necessary.

Plaintiff's counsel requested the Court to charge the Jury, that upon the facts as agreed upon, the plaintiff had a right to recover. The Court refused this request, but did charge, that upon the facts, the plaintiff could not recover, and the Jury found for defendant.

To which charge and refusal to charge, the plaintiff's counsel then and there excepted, and assigned the same as error.

JOHNSON & SLOAN, for plaintiff in error.

HOLT, *contra*.

By the Court.—LYON, J., delivering the opinion.

The plaintiff instituted an action of Debt against the defendants for the recovery of the amounts due on the two papers, of which the following are copies:

Hargroves vs. Chambers.

"PLANTERS' & MECHANICS' BANK, }
 "COLUMBUS, Jan'y 27, 1842. }

"George Hargroves, sen., has on deposit in this Bank, twenty-two hundred and fifty dollars, which will be paid to his order, on this certificate, with interest from date.

"J. C. WATSON, President.

"M. ROBERTSON, Cashier."

"PLANTERS' & MECHANICS' BANK, }
 "COLUMBUS, Feb'y 23, 1842. }

"\$2,150 25.

George Hargroves, Esq., sen., has on deposit in this Bank, twenty-one hundred and fifty $\frac{1}{4}$ dollars, payable to his order hereon, with legal interest from date.

"J. C. WATSON, President.

"M. ROBERTSON, Cashier."

The plaintiff, by this action, sought to charge the defendants with the payments of these debts, as the only surviving Directors of the Planters' & Mechanics' Bank of Columbus, (who were such Directors at the time these certificates were issued,) on the ground, that the indebtedness of the Bank, as evidenced by these certificates, at the time, was in excess of three times the amount of the capital stock of said Bank actually paid in, over and above the amount of specie actually deposited in the vaults for safe-keeping.

The parties went to trial on the following agreed statement of facts:

"GEO. HARGROVES, Ex'r, &c.,	} Debt, &c., in Muscogee Superior Court.
vs.	
"JAMES M. CHAMBERS and	
"JOHN BANKS.	

"It is admitted, in the above case, that George Hargroves is the executor of George Hargroves, deceased; that at the date of the certificates sued on, George Hargroves, deceased deposited in said Bank the amount of money therein specified and said Bank, by its then President and Cashier, gave him the certificates sued on; that on the 2d day of June, 1844 payment of them was demanded and refused by the Bank that the Bank was sued on them by said Hargroves, deceased

o July Term, 1842, of the Inferior Court of Muscogee county; that judgment was rendered on them against the bank, at the second Term, 1842, of said Court; execution sued thereon, and duly returned to July Term, 1853, 'No property.'

"It is also admitted, that at the time of issuing said certificates, Chambers, Banks, A. H. Flewellen, W. B. Ector, J. C. Watson, Daniel McDougald and Thomas Bury were the Directors of said Bank, and that at the time of the bringing of this suit they were all dead but Chambers and Banks, and that then Flewellen, Ector, McDougald and Watson had representatives and estates in the Court of Muscogee, but Bury had no representative in this State, and that more than twelve months from the grant of their letters elapsed before suit was brought.

"It is admitted, for the purposes of this case, that at the date of said certificates of deposit sued on, there was an excess of issue within the meaning of the fourth rule of the charter of said Bank sufficient to cover the amount of plaintiff's demand.

"It is further admitted, that in June, 1848, a judgment was rendered in the Superior Court of said county, a copy of which is attached, &c., but that no execution or other process has ever been sued out to execute said judgment, unless the Acts of the Legislature of 1840-'41-'42-'48 shall be construed by the Court to be such process, or to waive the necessity of any other execution of said judgment, if any such process was necessary.

"It is admitted that, before this, R. B. Alexander was, by a deed of said Bank, appointed assignee of assets, and took possession of them (a copy of which is attached.)

"It is admitted, that these assets were sufficient, if collected, to have paid the debts of the Bank, but that they were not collected, and the debts were not paid.

"It is further admitted, that said deed of assignment was executed by a Board of Directors, who succeeded these defendants in office, and that said deed was duly recorded, and that the assets conveyed in said deed of assignment could, by due diligence on the part of R. B. Alexander, have been realized upon and collected, but that they were not collected and were not applied to the payment of plaintiff's demand.

"It is also admitted, that said Alexander, Hargroves, sen.,

Hargroves vs. Chambers.

and plaintiff resided in the city of Columbus, Georgia, and that said Hargroves, sen., and plaintiff knew of said deed of assignment shortly after its execution, and that they did not prosecute a suit to subject said assets so conveyed to the payment of their said claim, further than to bring the suit mentioned above, versus the bank, and take the steps there stated.

"It is further admitted, that before and at the time of the commencement of this suit, the assets conveyed by the said deed of assignment were barred by the Statute of Limitations, or otherwise lost or wasted by the assignee.

"It is further agreed, that the Act of incorporation, and all the Acts of the Legislature bearing upon the question presented by the record of this case, and this agreement, be considered as in evidence, if necessary.

"It is agreed that the case shall be submitted to the Jury on the above statement of facts, and that the Court shall charge the Jury upon the law arising thereon, without other pleas or pleadings.

"And it is agreed that either party shall have the right to except to any decision of the Court, and have the same reviewed by the Supreme Court; and it is also agreed that either party may demur to the declaration or pleas, and except to the decision of the Court thereon.

"HOLT; JOHNSON & SLOAN."

Upon this statement of facts, the Court below charged the Jury, that the defendants were not liable. To which ruling, the plaintiff excepted, and brought the case before this Court for review.

Besides the facts stated, the record brought up, includes a copy of the proceedings instituted for the forfeiture of the charter of the Bank, and the verdict and judgment of forfeiture had therein, in the Superior Court of Muscogee county, on the 18th day of June, 1848. A copy of the deed of assignment made by the Bank to Robert B. Alexander on the 26th day of May, 1848, and a schedule of the assets turned over to the assignee.

The suit is founded on the 4th rule of the 6th section of the Bank charter, *Prince* 127, in these words:

"The total amount of debts which the said corporation shall at any time owe, whether by bond, bill, note or other security, shall not exceed three times the amount of the

capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe-keeping. In case of excess, the Directors under whose administration it shall happen, shall be liable for the same in their private and individual capacities, and may be sued for the same in any Court of record in the United States, by any creditor of the corporation, any condition, covenant or agreement to the contrary notwithstanding; but this shall not exempt the said corporation, or the lands, tenements, goods and chattels of the same from being liable for, and chargeable with, the said excess."

It being admitted that at the date of said certificates of deposits sued on, there was an excess of issue, within the meaning of the fourth rule of the charter of said Bank sufficient to cover the amount of the plaintiff's demand, it follows, that the defendants are liable, if these certificates are debts within the meaning of that Act, unless they are relieved from such liability by some fact or facts included in the statement.

The defendants insist, that no recovery can be had in this action against them—

1st. Because the liability of the Directors—if liable at all—is a joint liability, and that all that are in life, and the representatives of all who are deceased, that can, must be joined in the suit, and that four of the persons who were Directors with them, and who are dead, have representatives and estates in the jurisdiction of the Court, who can be joined in this action with them, and as they are not, the suit must fail.

2d. That the certificates of deposit being payable to order and bearing interest from date, are void, under the Act of 26th December, 1837.

3d. That these certificates are not such debts as enumerated in the 4th rule of the 6th section.

4th. That the assignment to Robert B. Alexander of all the assets of the Bank, together with the confirmation thereof by Act of 1843, (*Cobb*, 120,) and the subsequent waste or loss of these assets, by the assignee, relieved them from all liability.

5th. That the defendants' liability, or rather the plaintiff's right of action, is barred by the Statute of Limitations, whether it be considered a specialty, a simple contract debt, or a penalty, and that it must be one or the other.

Hargroves vs. Chambers.

6th. That the judgment of forfeiture of 18th June, 1843, operated as a discharge of the defendants' liability.

7th. That when the charter expired, by its own limitation, on the 1st of January, 1857, the liability of defendants created by that Act expired with the law.

8th. That, by the expiration of the charter, the debts due by the Bank, together with the liability of defendants, as Directors, for those debts, were extinguished.

Before the plaintiff can recover against the defendants, each one of these objections must be overcome; for, if one of them be sustained, unless it should be the first, the plaintiff's right of action is gone.

With this simple statement of the question in controversy, without a comment, although there is a wide field for one, and perhaps a necessary one, I shall proceed to a consideration of the objections, in the order that I have stated them.

1. It was not necessary, to enable plaintiff to recover against the two surviving Directors, the defendants, that the representatives of those who are dead should be joined with them in this action.

The liability of the Directors was a joint one. *Banks vs. Darden*, 18 Ga., 318. The representatives of joint obligors, by the rules of Common Law, could not be joined in an action with survivors. To remedy this mischief, and for the relief of the creditor, the Act of December 19th, 1838, (Cobb, 483,) was enacted so that the creditor should "not be compelled," as theretofore, "to sue the survivor alone, but may, at his discretion, sue the survivor or representatives of the deceased person, or the survivor in the same action with the representatives of such deceased person, any law, usage or custom to the contrary notwithstanding." By this Act, the plaintiff is expressly authorized, at his discretion, to bring his suit against the survivor, or against the representative, or against both in the same action, as he may choose. But, it is argued that that discretion must be a legal one; that, as it is to the interest of the defendants, the representatives should be made parties, so as to compel them to contribute their respective proportions of the liability, and not to suffer the whole to fall on the two out of the seven who happen to be in life, while the estates of the deceased ones were equally liable with them, and that the plaintiff shall not be permitted to use his remedy to their injury.

In the first place, we say, that the Statute has given the right to sue either, or both; that it was perfectly competent for the Legislature to do this, and the right being clearly given, we know of no power to restrict him in the exercise of that right. If the Court should attempt to define the discretion and determine for him in what case he should either sue singly or collectively, then would the right be taken from him, no matter on what pretence. If the discretion was given to the Court to exercise for the benefit of all interested, the question would be different; but it is given to the party, and we have no right to review it. That the exercise of the right operates oppressively in this case, we cannot, even if it were so, change the rule. The complaint would be against the Law, and that we could not remedy. But I cannot see how this suit affects the survivors. If it was against the plaintiff, even after judgment, could not be forced to elect out of each, *pro rata*. He would have the right then to collect the whole of his debt out of any one of the defendants. If the right of contribution existed at all, I cannot see why it would not prevail whether judgment is had against one or the one forced to pay.

2. We cannot see how these certificates of deposit can be affected by the Act of 19th December, 1837, (*Cobb*, 102.) that Act was intended to prohibit Banks from putting in circulation any paper intended, designed or fitted for circulation as paper money, which may or shall be redeemable or payable, at a longer period of time than three days after the date thereof, or with any other thing than gold and silver, at the standard value thereof. These certificates were payable at once—had no time whatever to run. The holder might have, within the hour of their execution, demanded payment. There was nothing in the writing itself restraining him from doing so, or protecting the Bank from such demand of immediate payment, and by the writing itself is a declaration to be judged. It is said that they are payable on order, and therefore intended to be negotiated, admitted, so are the bills of the Bank; still, whether in the hands of the payee or holder, demand can be made and enforced at once.

Neither does the fact that they draw interest from date, affect the validity of the contract. That does not take them within the rule of the Act. It may be well argued that the parties contemplated that the deposits should

Hargroves vs. Chambers.

not be immediately withdrawn, else there would have been no stipulation for the payment of interest. It may be well admitted that the parties intended that the deposits should remain in the Bank for an indefinite period; but while the parties had this in contemplation, and so intended, still, the depositor retained the express right to insist on the payment whenever he thought proper to do so. There is nothing in the writing from which the Bank could claim a postponement of the demand one hour, and there is nothing restraining the holder from exercising that right. Therefore, the certificates are not obnoxious to the Act of 1837.

8. Then, are these certificates of deposits debts, within the meaning of the fourth rule of the eighth section of the charter, for the excess of which the Directors are liable? We think that they are. The words of the Act are: "The amount of *debts* which the corporation shall at any time owe, whether by bond, bill, note or other security, shall not exceed," &c. It is insisted that these debts are neither by bond, bill, note or other security; that the liability of a bank for deposits is of two kinds: In the one, where the deposit is general, in that case, it goes into the general funds of the Bank, and the debtor gets a credit for the same, and the liability is as of an open account; and in the other, where the deposit is special, in that, the money does not go into the general funds of the Bank, but remains in specie, and the liability of the Bank, is that of bailee; that the liability of the Bank, on these deposits, must be either of one or the other of these, and whether of either, it is not within the Act, by bond, bill, note or other security; that is the argument, if we understand it, and to it we reply, that, whatever may be the character of the deposits, it is not a special one, in the ordinary acceptation of that term; for it certainly never was intended that the identical money deposited, should remain in the Bank in specie, and be returned in the same condition in which it was deposited. The fact that the Bank agreed to pay interest, excludes that idea, and establishes the fact that the money deposited was intended to, and did go into the general funds of the Bank, to be used and employed by it as other funds of the Bank. The deposit became the Bank's, and in lieu, the holder accepted their promise to pay the same amount—not the same funds—back, with interest. Neither is this deposit of that class

of general deposits which are passed to the general credit of the depositor, and evidenced by pass-book; for, in that case, the liability is by an open account between the parties. The creditor can check against the balance, but in this case, the deposit is evidenced by a certificate, which may be transferred from hand to hand, by indorsement, and the liability of the Bank is on the certificate to the holder; that is their promise, and by it they are bound. But whether these certificates be considered as special or general deposits, they are nevertheless debts, and debts of the Bank, and they (the certificates) afford the evidence of the debts. They are the securities for the debts, as a note, bill or bond is the security of a debt between the parties when the debt is evidenced in that way. Therefore they are debts in the meaning of the fourth rule of the sixth section. Another argument offered on this head is, that there could not be an excess of indebtedness at the time of the issuing of these certificates, as to them; because, although they might be debts, yet, the funds paid in, for which they were issued, were in the Bank, and must be considered as balancing that indebtedness; that is, if the certificates were debts, the money paid in constituted a fund, which was then in hand, for their payment, and therefore, as to them, there could be no excess. That is true, but the money deposited went at once into the general funds of the Bank, and constituted a fund, as much for the payment of other debts as these; but whether that be true or not, we hold that these certificates were *debts*, within the meaning of the rule. The agreement of the parties, that there was an excess of indebtedness at the time, within the meaning of that rule, it follows as of necessity that the Directors are liable for such excess.

4. Does the waste or destruction of the assets of the Bank, in the hands of Robert B. Alexander, the assignee thereof, release these Directors from their liability to the plaintiff?

The principle contented for, as I understand it, may be stated thus: "Where a sufficiency of assets, such as good and collectable notes, &c., is placed in the hands of an assignee by the debtor, for the payment of his debts, which assignment is subsequently declared to be a valid one, and the assignee authorized to collect the assets assigned, and pay the debts accordingly to the deed of assignment, by an Act of the Legislature, then, if the assignee should, by neglect or

Hargroves vs. Chambers.

waste, fail to make them available, and they should, in consequence, be lost or destroyed, such loss falls on the creditors, and not on the debtor.

The facts are: "That the legislature, in consequence of the suspension of The Planters' & Mechanics' Bank on the 18th December, 1840, to compel that Bank and others in the same situation to resume specie payments and to provide for the forfeiture of their charters, passed an Act, requiring the Governor to issue his proclamation, requiring those Banks in suspension to resume payment, and in case of their failure to do so, to cause judicial proceedings to be instituted forthwith against such defaulting Banks, in the Superior Court of the county where the same is located, to the end, that the assets of the same be immediately placed in the hands of a receiver, under adequate security, for the benefit of the creditors thereof, and to the end that the charter of such Bank may be declared as forfeited and annulled." On the 10th December, 1841, another Act was passed, requiring the Governor to arrest such judicial proceedings as had been instituted against defaulting Banks, under the Act of 18th December, 1840, provided such Banks should commence to redeem their liabilities in specie by or on the first of January next thereafter. A third Act was passed on the 13th December, 1842, enacting, "That in all cases when judicial proceeding had been commenced by the State against any Bank amenable to the provisions of the Act of 18th December, 1840, and which had failed to comply with the requirements of the Act of 10th December, 1841, upon a final trial of such proceeding, and the rendition of a verdict in which a judgment of forfeiture should be pronounced, the Judge shall pronounce the judgment of the dissolution of said corporation for all purposes whatsoever, saving and excepting as to its power, in its corporate name, to collect and pay its debts, and to sell and to convey its estate, real and personal which power shall be exercised by the receiver or receivers whose appointments are herein provided for, in the name of said corporation, subject to no control whatever by the corporation or its officers; and it shall be the duty of the Governor, on being notified thereof by the Judge before whom such case may be determined, to appoint three competent persons as receivers for the same, who shall not be indebted to said Bank, and who shall give bond, with appro

security, to the satisfaction of the Governor, in a sum equal to double the amount of stock subscribed for, and paid into said Bank, conditioned for the faithful performance of the trust reposed in them, whose duty it shall be to take charge of, and collect as early as practicable, the debts and demands due and owing to said Bank, and to pay off and discharge the liabilities of said Bank."

After the passage of this Act, and in June, 1843, a general and unqualified judgment of forfeiture was rendered against this Bank, but before this judgment was had, and on the 26th day of May, 1848, the Bank made a full assignment, by deed to Robert B. Alexander, of "all and singular the property, goods, effects, debts, dues, claims and all other personal estate belonging to, or in any wise appertaining to said Planters' & Mechanics' Bank of Columbus," upon trust, "that the said Robert B. Alexander, his heirs, executors, administrators and assigns do, and shall, as soon as convenient, make sale and dispose of so much thereof, and such part thereof, as is in its nature saleable, for the best price, in money, that can or reasonably may be had or obtained for the same, and do and shall collect and get in so much thereof as is not in its nature saleable and is yet outstanding;" and after payment of all expenses, charges, commissions, &c., incident to the execution of the trust, &c; "and then in trust that he (the said Robert B. Alexander) does, and shall apply the residue of said trust monies to the payment and satisfaction of the several sums of money due and owing by said Planters' & Mechanics' Bank of Columbus, to all the creditors of said Bank *pari passu*, and without any preference or priority of payment other than such as may be prescribed by Law."

No receiver was appointed by the Governor, and on the 28d December, 1843, the Legislature passed another Act, which, after reciting that "judicial proceedings were instituted against the Planters' & Mechanics' Bank of Columbus," and others "which resulted in decrees of forfeiture of their several charters *as provided for and contemplated by said Acts*" of 18th December, 1840, 10th December, 1841, and 13th December, 1842, as recited. "And whereas, prior to said decrees of forfeiture, each of said banking institutions had regularly made assignments of all their property, real and personal, and all their debts, credits and effects for the ben-

est of their creditors. *And whereas*, under the provisions of the said Act, assented to on the 18th December, 1842, no receivers have been appointed, and no person can be found willing and competent to act as such:

"*Be it enacted*, That from and immediately after the passage of this Act, the assignments severally made by the said banking institutions aforesaid, by the Planters' & Mechanics' Bank to Robert B. Alexander, &c., which assignments conform to the Act of the last General Assembly, and are of record in the Clerk's office of the Superior Court of Muscogee county, shall be taken, held and considered valid for all purposes, both at Law and in Equity."

The assets that were so assigned, were ample to pay the debts, but from neglect or waste of the assignee, Alexander, were lost or destroyed, so that the creditors were not paid, and these Directors now insist, that such loss shall fall on the creditors. In support of that position, a case from 1 *Sul.*, 153, is relied on, in which it is stated as a rule, "That when one devised lands to trustees for the payment of debts and legacies, and the trustees raised the money and converted it, so that the debts and legacies remained unpaid, it was resolved that the heir should have the land discharged; for the estate was debtor for the debts and legacies, but not for the faults of the trustees, and therefore is liable so long as the debts, &c., should or might be paid. And where the land has once borne its burden, and the money is raised, it is discharged, and the trustee liable." To the same effect are the cases of *Carter vs. Barnardiston*, 1 *P. Wms.*, 505; *Ivey vs. Gilbert*, 2 *P. Wms.*, 20. I must confess, that I cannot see any likeness between the principle of those cases and the one before us; for, without the charge made on the lands by the deviser, they would not have been subject to the debts or legacies. The charge on the lands and the appointment of trustees to receive and apply the profits are from the same source, and created at the same time and by the same act. It was as competent to appoint the person to receive the funds and apply them to the charge, as it was to make the charge, both being voluntary, and to limit the time for the continuance of the incumbrance, only to that within which the charge might have been raised from rents and profits. However this might be, the authority of these cases is very doubtful, even for the principle they announce; for

Cage vs. Harrison, 2 Vern., 85, also cited, the Master of the Rolls doubted, took time to consider, and finally, holding to the contrary, decreed that the trust should stand charged; and plaintiff to release and assign bond and judgment, &c. So it was in *Smith vs. Smith*, 2 Vern., 178, citing the case of Sir Andrew Corbitt, where, even at Law, if the heir has taken the profits, which should be applied for the payment of debts, the land should remain chargeable therewith. The case of *Massaveen vs. Hutchinson*, 2 Ball & Beatty, stands upon a very different footing. In that case, the assignment was to trustees appointed by the creditors for the payment of their debts, were subject to be removed by them. The Court held that the money received by the trustee, from the estates assigned, and which was in his hands at his bankruptcy, was received by him as the agent of the creditor, was a satisfaction *pro tanto*, when it came to his hands, and the loss should fall on the creditor, and if the facts in this case were the same as in that, I should hold likewise; for, in my opinion, when the creditor himself has the possession of securities for his debt, and suffers a loss by waste or wilful neglect, the loss is his. That, I think, cannot be doubted. The Court stated in that case, if I understand it correctly, that if the trustee had been appointed by the debtor, or even by the Court, on the application even of the creditor, and there was a conversion by the trustee so appointed, the loss would be on the debtor, and not the creditor. That certainly was the dictum of Lord THURLOW in *Rigge vs. Bowater*, 3 Bro. C., 565; and so the rule is stated in 2 *Mad. Ch. Pr.*, 237, and that is going a long ways further than is necessary to go in this case. The next case relied on—and it comes nearer to this case than all others—is that of *Wright vs. Nutt*, 1 H. Blk. R. Sir James Wright, who was Governor of Georgia, while a province of Great Britain, fled from Georgia in the war of the Revolution, leaving his estate, which was confiscated by Act of the Legislature, and in the act of confiscation, it was provided, that the debts of Wright due to the citizens and the friends of this Republic, should be paid from such estate. Wright himself was excluded from all interest therein or from suing in the State. One Miles Brewton, of the State of South Carolina, had a debt on him which was not paid from the fund in Georgia, although it was ample for that purpose and for the payment of all other debts. . Suit

Hargroves vs. Chambers.

was brought on that debt against Sir James Wright, in England, by the executor of Brewton, or his attorney, and a judgment had at Law. Wright died before satisfaction, and when the judgment was about to be enforced against his executors, they filed a bill to enjoin it, and to compel the creditor to look to the fund in Georgia. Brewton, while in life, was a friend of the American Government, and an enemy to Great Britain. Wright, on the contrary, was a British subject, and a great sufferer by the war. Lord THURLOW, on the hearing for the injunction, after stating that the Equity of the bill was different from any he ever heard of before that Court, did lay down a rule to meet that case, thus: "I am, therefore, clearly of opinion that, provided a case is made by which it appears that there is in the hands of a creditor either possession of the estate in fact, or the clear means of effecting that possession, he ought to be called on to do so, or at least the Court should interpose. When I have stated that to be my opinion, I confess that, thinking much of the case of *Holditch vs. Mist*, I do not know exactly how to reconcile the decision of that case with the principles I have now laid down. The only way I have to deal with it, is to avoid it." There are some circumstances in that case which are not in this. Wright, or his executor, by paying up the debt, could not have been remitted to the right of the creditors against the fund in Georgia—a circumstance on which much stress was laid in that case. In this, the Directors, by paying up the debts, could have been remitted to the rights of the creditor against the fund in the hands of the assignee. There is another: the fund in Georgia was gone from him, whether the debts were paid or not; and another was, the litigants were subjects of different countries, and the fund in one and the litigation in the other. The decision was wrong. There was no such rule of Equity as that laid down by the Court. It was manifestly wrong, although concurred in by Lords LOUGHBOROUGH and KENYON. It was never regarded as a proper precedent or authority even in the Courts of Great Britain. The decision was made in 1789. Afterwards, in 1802, the case of *Wright vs. Simpson*, 6 Ves., 728, came before Lord ELDON, involving the identical principle and presenting nearly the same facts. The Chancellor considered *Wright vs. Simpson* at length, and his conclusion is: "This is a question of great importance; and if I found myself

err.

bound to decide this cause, not upon the facts, but upon the principle laid down in the authorities to which I am referred"—that of Lorda THURLOW, LOUGHBOROUGH and KENYON, in *Wright vs. Nutt*—"admitting the facts formed a ground for the application of that principle, I should have been obliged to express a different opinion from all those authorities, as much as I respect them. Lord THURLOW then says, as to *Holditch vs. Mist*, he does not profess to overrule it; but professing not to overrule that case, unless the circumstances relied on by Mr. Richards, that the parties then were subjects of the same country, or other circumstances distinguish it: I say, Lord THURLOW has overruled it. But the point is decided, if *Holditch vs. Mist* stands. That case is directly in point. Can it be said that the Legislature intended to make a provision for the creditors, not requiring them to come in as against the provision, and that they should retain the power of suing the debtor personally? Then there was an absence of intention. Their inclination would rather have been to take away that power; but without adverting to that, they did leave it. There was a creditor in possession of all the rights Lord THURLOW, KENYON and LOUGHBOROUGH allude to, except the circumstance of not being able to assign the fund, and he refuses to go in, and proceeds personally. This Court then said, it was the natural, legal, genuine fruit of the contract, and what Equity was there, independent of the incapacity to assign the fund? That case is an authority directly, and I must know satisfactorily why it should be overruled." The facts in *Holditch vs. Mist*, 1 P. Wms., 95, are: Holditch was sued by Mist to recover £800. The defendant at Law brought his bill and moved for an injunction, urging that, in regard to the late Act, 7 Ga., 1 c., 27, he had vested all his estate in the trustees for the South Sea Company, and made a provision for the payment of his debts (being late a director) out of his estate. The defendant, Mist, sought to repair to the trustees; that it would be extremely hard to permit the plaintiff at Law to take out execution against the body of his debtor; and the injunction in that case was refused. Admit, now, that the case of *Wright vs. Nutt* is in point, would this Court be justifiable in adhering to the rule laid down in it, or should we not rather—are we not bound to enforce that of *Holditch vs. Mist*? Most clearly. In the cases other than that of *Holditch vs. Mist* are not in

Hargroves' vs. Chambers.

point. These are the authorities referred to in support of the position of defendants. They utterly fail to make a case for them. What Judge McDONALD has said in *Robinson vs. Lane*, 19 Ga., 864, is so appropriate, I extract from it: "The assignee"—Robert B. Alexander—"was not the agent of the creditors; he was not subject to their control; he was made assignee without consultation with them; they have relinquished no right which they had against the Bank or Directors; the Bank might have been sued by them, notwithstanding the assignment, they have neither directly nor indirectly, in consideration of the assignment, released the Bank from liability; the Bank could not plead in bar the assignment. The creditors cannot be forced by the debtor to accept an assignment in satisfaction; this can be done by contract alone, and there is no contract, express or implied, which discharges the Bank or the Directors, in consequence of the assignment. This is not the case of collaterals pledged to creditors for the payment of his debt, and he loses them by negligence." This creditor had no voice in the selection of the assignee; on the contrary, he was appointed by the Bank, not in pursuance of the requisition of the Act of the Legislature, but in avoidance of it. The Legislature subsequently ratified that Act, so far as to accept what the Bank had done and made valid an assignment, which the Bank no doubt had many reasons to doubt, and as the Act was for that purpose only, giving him no new powers, a fair presumption is, that it was done upon the application of the Bank, and not of the creditor. But it is complained that all the means of the Bank for payment of debts have been stripped from it by Law, and they—the officers and the Bank—excluded from all control or interference with the assets, and that now all these have become, in consequence, lost, it is extremely harsh, unheard of rigor to still continue the liability of the Directors! Upon what a slender foundation rests this magnificent structure! Instead of the Bank's being stripped of its assets by Law, it was stripped of all its assets just sixteen days before the Law could get hold of them by its own act, in an assignment to one of its own selection, without security. The Law provided that the assets, upon a dissolution of the Company by judgment, should go into the hands of receivers, who should give bond, with good security. To the protection of the Law, this Bank and its officers did not think proper to trust. But the Law

Macgroves vs Chambers

excluded the Bank and its officers from all control. How? What control did the Bank or its officers have after that deed of assignment? If that assignment was a *bona fide* one, it excluded the Bank and its officers from any control of the assets as effectually as the Law could have done. But conceded the fact that the Law did exclude the Bank and its officers from the control of the assets, yet it gave none to the creditors, nor any power over them. Did this provision exclude the Bank, the Directors or any of the stockholders from appealing to a Court to compel the assignee to discharge the duties of his appointment, or to have a new one appointed? They all knew of what the assets consisted; what was necessary to be done to make them available; what was being done, yet not one word of complaint is made against him until the assets are gone. The complaint does not appear to be well grounded.

For these reasons, we hold that the creditor's claim on the Directors was not prejudiced by the neglect or waste of the assets by the assignee.

5. The next question is, Whether the plaintiff was barred by the Statute of Limitations; considered as a penalty, a simple contract, specialty or statutory liability?

This question was adjudicated directly, as to stockholders, in *Lane vs. Morris*, 10 Ga., 164, and in *Thornton vs. Lane*, 1 Ga., 459, and as to directors, in *Neil vs. Briggs*, 12 Ga., 104; nor have those decisions been disturbed or doubted by any of the subsequent cases. They must stand, therefore, as settled. Counsel for defendants made, in the argument, a most labored effort to show that the liability of the Directors, whether on the Statute or on the certificates, was matter of contract: in the one case, a specialty, and in the other, a simple contract. If a specialty, it was barred by the Act of 805, in four years, and in the other, in four or six years. We admit that the Act of incorporation is, of itself, when considered as between the Legislature and the corporator, a contract. The Legislature, by the Act, grants to the corporators certain privileges; they accept and enter into the enjoyment. This is the contract, and considered so for the benefit of the corporators; for by it, viewed as a contract, they are protected from subsequent legislation; still, the Act of incorporation is a law of the State, and does not depend, or its existence as a law, upon the acceptance or ratification.

of the corporators, but their acceptance and performance clothes them with its privileges and brings them within its operations as a law already enacted. The liability imposed by the Statute is statutory, because it depends for its existence solely on the Statute, and not upon any special contract between the corporator and the person with whom he deals. For instance, the contract in this case between Hargroves and the Bank, as shown by these certificates, is a simple contract. The Bank, in consideration of the money received, agrees to pay him that amount of money, with interest. Now, as between Hargroves and the Bank, the liability of the Bank is the same as if the contract was between natural persons, and governed by the same rules. But as there was an excess of indebtedness, in violation of the fourth rule of the sixth section of the Act at the time the Directors became liable for the payment of that debt, not by the contract between Hargroves and the Bank, or any contract between the Directors and Hargroves, but in consequence of a stipulation in the Statute that they should be liable upon such contingency. There is, in fact, no contract between Hargroves and the Directors, although their liability, so created, is an incident to his debt, a security afforded by the Statute, and one of the inducements held out by the Law to Hargroves and all others, to deal with, and trust the Bank. To our minds, it is clear that the liability of these Directors is statutory, and not a specialty contract—remedial, and not penal, and that the right of action is barred only after a period of twenty years.

That the Act of 1805 does not create a bar to a statutory liability, but to specialty contracts not specialties generally, is demonstrated by Judge WARNER in *Lane vs. Morris*, 10 Ga., 164. Any thing that I could say on that subject would not strengthen that most satisfactory argument, and would be but a reproduction of the same thing in a less forcible and conclusive manner.

6. It is contended that the judgment of forfeiture pronounced against the Bank in June, 1848, dissolved the corporation, extinguished the debts due to and from the Company, and with the debts of the Bank fell the liability of the Directors. We hold that the judgment did not have that effect. If it was true, as counsel insist, that a dissolution of a corporation by judgment of forfeiture or by the expiration of

charter, extinguished the debts due to and from such Company, this judgment of forfeiture could not have that effect, because the Act of 18th December, 1840, and 13th December, 1842, under which the judgment of forfeiture was pronounced, prescribed, in terms, what effect that judgment should have. The right to collect and pay its debts, sell its estate, both real and personal, was, by the Act of 1842, expressly saved from the operation of the judgment. But it is said, that as the judgment did not contain such saving, and was, on the contrary, a general, unlimited judgment of absolute forfeiture, of a Court of competent jurisdiction, and of force until set aside, it must have that effect. We do not think it was necessary that the judgment should contain such saving. It was for the Court to pronounce the judgment as it did, and it was for the Law to say what should be the effect of such judgment. That the Law has done, and the judgment cannot have a more extended effect than that expressly provided and intended. But the judgment of forfeiture, independently of such saving in the Act, could not have the effect claimed, and as our judgment on the effect of a dissolution of the Company, by expiration of the charter, will apply equally to that by judgment, by forfeiture, I shall pass from this point, referring to, and adopting all that is said on the point by this Court in *Lane vs. Thornton*, 10 Ga., 459; *Hightower vs. Thornton*, 8 Ga., 492.

7. Another objection urged against the right of the plaintiff to a recovery is, that the Statute which created this liability—that of the Act of incorporation having expired by its own limitation on the first of January, 1857—that the liability expired with the Act. A decision of this Court, in *The Bank of St. Mary's vs. Clayton*, 12 Ga., 475, and the cases cited in that case, are relied on in support of that position. That was an action by The State, on the information of Clayton, against the Bank of St. Mary's to recover the penalties imposed by the Act of 1835, for issuing change bills, which that Bank had violated. While the suit was pending, the Act was repealed. The Court held, that "a penalty can not be recovered after the expiration of the law which imposes it, either by its own limitation or a repeal by the power which enacted it, and the fact of the commencement of the suit by the informer, who would be entitled to one-half of the recovery, did not change the rule, as that did

not give him a vested right in the penalty, but at most, only an inchoate right, that could only be fixed or vested by judgment; that no judgment could be recovered on a repealed Statute; that the repeal of the Statute prevents the imperfect right from being consummated; from becoming a vested right or contract; and that was the conclusion to which the Court came from a review of all the authorities cited, and they are numerous: *Miller's Case*, 1, *W. Black, R.*, 451; *Lewis vs. Foster*, 1 *N. Hamp. R.*, 61; *Oriental Bank vs. Freese*, 18 *Maine*, (6 *Shep.*) 109; *People vs. Levington*, 6 *Wend.*, 536; *Fenelon & McMasters' Petition*, 7 *Barr.*, 173; *Stoevers vs. Immell*, 1 *Wat.*, 258; *Buckallow vs. Ackerman*, *Hal. N. J. R.*; *Commonwealth vs. Welch*, 3 *Dana*, 330; *Allen vs. Faran*, 2 *Bailey*, 584; *Pope vs. Lewis*, 4 *Ala.*, 487; *Yeaton vs. The United States*, 5 *Cranch.*, 281; *Schooner Rachel vs. The United States*, 6 *Cranch.*, 329; *The United States vs. Preston*, 3 *Peters*, 57; *Norris vs. Crocker*, 18 *Howard*, 481; and these cases are all relied on in support of the proposition, that these defendants are relieved from their liability by the expiration of this charter. They do not support it. There is the essential difference, that the subject-matter of all these suits were penalties prescribed for the violation of some public law or rights that could only be vested by judgment, and in which the informer or prosecutor had no vested right; no right grounded on a contract; no right but such as a judgment would give. The Court held in all the cases that the repeal of the law imposing the penalty defeated the recovery, and all concede that if the right was a vested one, or was secured by contract, a repeal of the law could not take away the right. In this way, wherever the question is discussed by the Courts, these authorities not only do not support the proposition, but they establish the contrary. As the extract from Blackstone in the principal case bears right on this question, I will repeat it: "And here we must be careful to distinguish between the property, the right of which is before vested in the party, and of which possession is only recovered by suit or action, and property to which a man before had no determinate title or certain claim, but he gains, as well the right as the possession, by the process and the judgment of the Law. Of the former sort, are all debts and choses in action, as if a man give bond for £20, or agrees to buy a horse at a stated

sum, or takes up goods of a tradesman, upon an implied contract, to pay as much as they are reasonably worth: in all these cases, the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract or agreement made, and the Law only gives him a remedy to secure the possession of that right, which already, in justice, belongs to him. But there is also a species of property to which a man has not any claim or title whatever until after suit commenced and judgment obtained in a Court of Law, where the right and remedy do not follow each other, as in common course, but accrues at one and the same time, and when before judgment, a man cannot say he has any absolute property, either in possession or claims," of these are penalties, damages, costs and expenses. 1 *Black. Com.*, 437. There is the difference in Clayton's case. The thing sued for was a penalty. His right depended on the judgment. The plaintiff here sues for a thing that belongs to him in right of his contract. His right and remedy go together. The liability of these defendants is not a penalty, and so adjudged in all the cases. *Banks vs. Darden*, 18 *Ga.*, 318. But it is a right vested in the plaintiff at the time of making the contract with the Bank, as an incident to that contract and a security for its performance.

I refer to but one other authority, and it is that of *Stevenson vs. Oliver*, 8 *Mees. & Wels.*, 234, in which all the Judges held, the point being directly made, and the only one in the case, that rights acquired under a temporary statute are permanent and continue after the expiration of the law. PARKER remarked, in his opinion, "that there was a difference between a statute repealed and one expiring by its own limitation; that a statute repealed was as if it never existed;" and mention this because I have my doubt as to whether a penalty even could be avoided that was imposed by a Statute that had expired by its own limitation, and which had not been repealed; and I think the Court, in *St. Mary's Bank vs. Clayton*, ought not to have said that a penalty cannot be recovered after the expiration of the law, particularly as here was no necessity to say so in that case.

8. Were the debts of the corporation extinguished by the expiration of the charter? and if so, did the liability of the Directors fall with those of the corporation?

We admit that it is laid down broadly by Judge BLACK-

Hargrove vs. Chambers.

STONE, in his *Com.*, 1 Vol., 484, and by Chancellor KENT, in his *Com.*, 2 Vol., 807, and in *Ang. & Ames on Cor.*, 828: "That the debts of a corporation, either to or from it, are totally extinguished by its dissolution, so that the members thereof cannot recover, or be charged with them, in their natural capacities." The commentators cite, in support of the text, 1 *Lev.*, 287; *Co. Litt.*, 186; *Colchester vs. Seaber*, 3 *Burrow*, 1,868, *arg.*; *Rex vs. Passmore*, 3 *T. R.*, 241. *Grant on Cor.* 308, states the rule a little differently, thus: "Both the property, choses in action, and other rights of the corporation, as well as its liabilities, *ipso facto*, pass from it on the event of dissolution." *Fonblanque*, 308, still different: "Neither can they (the corporation) be charged in their private capacity with the debts of the corporation, although dissolved." Same references. No practical good could possibly result from a review of the cases referred to by those text writers, especially as they have already undergone such extended investigations by different members in this Court, in the cases to which I have so frequently referred. Nothing that I could say would add to what is said by Judge LUMKIN on the one side, or detract from what Judge BENNING says on the other, in *Moutrie vs. Smily*, 16 *Ga.*, 289. There may be found all the learning and law of the case, on both sides. It is sufficient to say here that the conclusion to which the Court has come, after a patient consideration of the whole of the authorities and able arguments of counsel, is, that the precedents do not support the texts of the authors which I have stated. It would perhaps be too broad to say that there is no foundation for the rule, but we are clear that the rule, as stated, must be taken in a much less limited sense than as stated by those able expositors of the Law. But if the rule be taken as applicable to such corporations as existed most commonly in England, such as were for political, religious, educational or charitable purposes, then the principle is correctly stated; for in all such cases as those, we can very well see how and why it is that the debts due to and from them are extinguished totally by a dissolution. There are more reasons than one why it should be so. There is no one to sue or be sued. The purposes for which donations and grants were made, have failed. The members of the corporation have no personal interest in the assets, one way or the other. They cannot take them, nor be charge-

le with them. They (the assets—personal) necessarily become vacant. But when the rule is to be applied to joint stock companies, or that class of corporations that are incorporated for purposes of trade and are the subjects exclusively of private venture, there is no reason for the rule, and the rule itself must cease, for it is wholly inapplicable and inappropriate. It would defeat the purposes of the Law, and the destruction of every principle of justice, not only as to the incorporators themselves, but to individuals and the public at large who have dealt with them.

Corporations, most akin to this, at Common Law, were creatures of favorites of the Crown, created for some public good, and as inducements to its subjects to engage in trade and commerce, so that the greatness and power of the Government might be extended and enriched; hence, the grants of privileges were made, and every facility and protection given to induce capital and individual enterprise to engage in pursuits that would bring back to the source of power so many corresponding benefits. Here they are regarded as monopolies, obnoxious to individual and private enterprise, and are to be restricted and governed by different rules. Such a corporation as this would not be one at Common Law. It lacks perpetuity, an essential element in a corporation at Common Law. The members are individually liable for the debts, an element utterly opposed to their very being incorporated on a principle, as some one said, speaking of Dr. Salsbery's case, as excluded the idea of incorporation. How can the rule of administration or disposition of assets, at the death of the one, apply to, and govern in the case of the corporation? Could the Legislature, in the incorporation of this Bank for a definite period, have intended that at the expiration of that time the capital stock paid in, and the profits of the business, should utterly fail, or worse than that, (for the Legislature might provide against such a calamity as to them, by administering before its death;) but that the debts should fail, that those who have trusted the Bank, who hold its bills, shall lose their debts? Certainly not; for why attach the personal liability clause? It is no answer to say that those who deal with the Bank are acquainted with its condition, and deal with their eyes open. That I know is true; but, upon the idea, that what one may know, he may know; but, in point of fact, it is not true. For how

Margroves vs. Chambers

many are there who daily receive and pay away bank-bills that know not when the charter expires, or anything else about them, except that they received them as money and paid them out in the same way? By applying this rule, these restrictions on the Bank, intended for the security and protection of those who deal with them, are employed to the advantage of the Bank and injury of the citizen, by enabling them to get a credit, in the first place, on the faith of the personal liability of the members, and then by the expiration of the charter to die out of it and hold their unjust acquisition by withdrawing them from the corporation before its death. But it cannot be so. The application of such a principle, under the circumstances, would be monstrous—without, and against reason.

But it may be asked, if this rule does not apply, how are we to get one, in the absence of any legislative provision, to meet the case? And we answer, that a Court of Equity, in such a case, (I mean the dissolution of a corporation with assets and outstanding debts,) would lay hold of the assets and administer and distribute them for the benefit of all interested. Why not? And what is the objection to it? I have yet to hear or see one. COLLIER, J., in *Paschal vs. Whitwell*, 11 Ala., 477, says that it is a settled rule in Equity. *Story Eq.*, §1,252, lays down the rule broadly, and this Court has decided it to be so, in *Hightower vs. Thornton*, 8 Ga., 492. If this rule exists in Equity—and that it does, there can now be no doubt, in Georgia at least—the position of the defendants falls to the ground; for their entire dependence is on the idea of an utter extinguishment of the debt, with all its incidents, not only as against the corporation, but as against the assets and against all others liable on the debt with the Bank, that the debt is annihilated, so that it cannot even be revived.

9. Suppose, however, that we admit that the debt of the corporation is extinguished by its death, how does that affect the liability of these Directors? Their liability is independent entirely of that of the Bank, and exists for a different reason. They are, by the charter, to be liable for this debt in their individual capacity. What does the continuance or dissolution of the corporation have to do with the individual rights or liabilities of its members? Nothing whatever. The liability of the Director is created by his own act, and in

erogation of the chartered privileges, is not dependent on its continuous existence, and its failure does not protect him, but it does and must remain *until satisfied*, or released by the act of the creditor.

10. There is another view of this whole question, that is *absolutely conclusive*, to my mind. The assignment by the bank of its assets for the payment of debts being a valid act, and the saving in the Act of 1842 providing for rendition of a judgment of forfeiture, and the recitative enactments of the Act of 1843, that the judgment rendered, was such an one as was provided for and contemplated by the Act of 1840 and 1842, abrogated the rule of extinguishment, even if it could be said to apply to this corporation, and provided for an administration and disposition of the assets of the Bank, and subserving the ends of the Law and protection and guarding the rights of all parties, and the subsequent expiration of the time limited for the continuance of this corporation did not alter, interfere with or affect these corporate and statutory provisions and dispositions for the protection and security of these assets and liabilities from destruction by any possible rule of construction.

Our conclusion on all the points taken is, that the defendants are liable, and plaintiff entitled to recover, and the court below erred in holding otherwise.

Judgment reversed.

Ree vs. Doe, ex dem. Adams.

ROE, Casual Ejector, et al. vs. DOE ex dem GEORGE W. ADAMS.

1. No recovery can be had in ejectment when the lease under which the alleged trespass was committed, has expired before the trial.
2. Where the verdict of the Jury in ejectment is too uncertain to enable the Court to award judgment upon it, it is void.

Motion for New Trial, and in Arrest of Judgment, from Bibb County. Decided by Judge LAMAR, November Term, 1859.

This was an action of ejectment in the fictitious form, containing four demises: The first was a demise from George W. Adams, alleging that he had leased the premises to the nominal plaintiff, beginning from February 24th, 1855; the second was a demise from Lewis L. Griffin, alleging a lease for thirty years, from February 5th, 1836; the third was a demise from the Merchants' Bank of Macon of a lease for twenty years, from the 1st day of July, 1845; and the fourth, a demise from the Monroe Rail Road & Banking Company, of a lease for twenty years, from the 1st day of January, 1843.

The land sued for under the demise from Adams is described as a part of the Macon Reserve, and known as a part of lot No. 13, in fraction 3, containing 47 acres, more or less. The premises sued for under the other three demises are described as a part of the Macon Reserve, and known as fractional lot No. 3, containing 86 acres, 3 roods and 35 poles. The suit was against Margaret Riley, administratrix of William Riley, deceased.

The Jury, on the trial, returned the following verdict in the case.

"We, the Jury, find for plaintiff one and three-fourths acres of land, the same being now enclosed and used by the estate of William Riley, or Mrs. Riley, being a part of lot No. 3, lying on the north side of the road leading from Macon to Forsyth, in front of where Mrs. Riley now lives, or lot No. 2 and fifty-two dollars and fifty cents for rent from November, 1847, to May, 1858.

The paper title introduced on the trial consisted, first, o

See vs. Doe, et dem. Adams.

copy grant from the State to Lewis L. Griffin, dated February 2d, 1836, for 86 acres, 3 rods and 35 poles, known as lot No. 3, in the plan of the Macon Reserve; second, a deed from Griffin to the Monroe Rail Road Company for said lot No. 3, less 7 and $\frac{1}{2}$ acres conveyed to one Jowler; third, a deed from the Merchants' Bank of Macon to George W. Adams, dated February 24th, 1845, for part of the Macon Reserve, known as part of lot No. 13, in fraction 3, containing 47 acres, more or less; fourth, a bond executed by William Riley to George W. Adams for the penal sum of \$100, dated June 11th, 1845. In the condition attached to which, it is recited that William Riley "has been trespassing on the land of said George W. Adams, to-wit: fraction 3 Macon Reserve."

There was a good deal of parol evidence introduced on the trial descriptive of the premises in dispute, &c., but it is not deemed necessary to state it in detail, further than this; that the evidence does not show whether the one and three-quarter acres referred to in said verdict were included in that part of lot No. three for which suit was brought under the deed from Adams.

Counsel for defendant moved the Court below for a new trial, on several grounds; which motion was refused by the Court.

Only two of the grounds taken were passed upon in this Court, viz:

1. Because the verdict was against the Law and against the evidence.

2. Because the verdict is indefinite and uncertain, and cannot be executed.

N. WHITTLE and B. HILL, for plaintiff in error.

E & GRIER, and RUTHERFORD, *contra*.

the Court—LUMPKIN, J., delivering the opinion.

Release under which the recovery was had in this case expired before the trial, of course no recovery could be had under it without amending. The verdict, therefore, is contrary to the evidence. This objection, we admit, is

Doe vs. Doe, et al. Adams.

purely technical; but as this is a fight for a female, and counsel contends for the extreme rights of his client, he is entitled to the benefit of the objection.

But there is a more substantial difficulty in this case, resulting from the uncertainty of the verdict.

Plaintiff sues for 47 acres of land, composed of part of lot No. 18 and fractional lot No. 8. The 47 acres described in the declaration does not include the whole of fractional lot No. 8, which contains upwards of 80 acres. Now, to the alleged trespass upon plaintiff's premises, defendant pleads the general issue, not guilty. The premises in dispute, then, is the 47 acres of land described in the writ. The Jury, by their verdict, found $1\frac{1}{2}$ acres, and describe it as a part of lot No. 8. Now this may be true, and yet the parcel of land described in the verdict may be outside of that part of lot No. 8 which composes, in part, the 48 acres claimed by the plaintiff.

How could the Court enter up judgment and direct a writ of possession to issue upon this verdict? Had the Jury found that the parcel of land embraced in their verdict was a part of the premises in dispute, it would have been sufficient.

It is laid down in *Lee vs. Tapscott*, 2 Wash. C. C. Rep., 270, that in ejectment the verdict being for the plaintiff for the land laid down in the survey made in the cause, as comprehended within certain lines as described by the Jury, a judgment that the plaintiff recover his term in and of the lands mentioned in the declaration, is erroneous.

It is not enough that the lands are sufficiently identified by the verdict as to enable a surveyor to locate the verdict, but the verdict itself must be so certain as to enable the Court to know in advance of a survey, that it is awarding judgment for the premises in dispute. Otherwise, the Sheriff might be guilty of a trespass for executing the judgment.

DOE vs. DOE, *ex dem.* JOHNSON *et al.*

DOE, Casual Ejector, *et al.* vs. DOE *ex dem.* W. A. JOHNSON *et al.*

In an action of ejectment, when the title is brought down to two persons, and the defendant offers a deed from one of the two for half of the land, that deed is admissible as evidence to protect the defendant holding under such deed from an eviction.

Ejectment, from Worth Superior Court. Tried before Judge LAMAR, at April Term, 1860.

The defendant in error brought an action to recover lot of No. 16, in the 16th district of Worth county.

After the plaintiff, on the trial, had introduced his evidence and rested his case, defendant, among other things, offered in evidence a deed from one Burch to Eliza Calhoun for one-half of the premises in dispute.

Counsel for plaintiff objected to its introduction, on the ground that it did not specify *what* half of the lot it was intended to convey. The Court sustained the objection, and rejected the deed, holding that the same was void for uncertainty.

To which defendant excepted.

Defendant then proposed to prove that said Burch had an undivided half interest in the lot; that Calhoun and Burch bought the lot and had the deed made to them jointly, and were equally interested. The Court rejected the evidence; counsel for defendant excepted.

The Jury found in favor of plaintiff.

SCARBOROUGH; WARREN & WARREN, for plaintiff in error.

STROZER & SLAUGHTER, *contra.*

By the Court.—LYON, J., delivering the opinion.

The plaintiff brought the title down to one A. R. Broyles, after proving the defendant to be in possession, closed; defendant introduced a deed from A. R. Broyles to one H. T. Calhoun and Benjamin Burch, and then offered a deed from Burch to Eliza Calhoun for one-half the lot.

The Court ruled that deed out for uncertainty, and we think the Court erred. That it failed to designate what particular part of the lot was conveyed by it, made no difference. The deed from Broyles to Calhoun and Burch vested in Burch a half interest in the lot, and Burch's deed conveyed that interest to Eliza Calhoun, and enabled her to enter on the land under it, by her tenant, Aultman. The plaintiff, under his demise from James H. T. Calhoun, could only have been let into the possession with Eliza Calhoun. His interest was as uncertain and indefinite as hers. That deed was sufficient to prevent an ejection of her tenant, and it ought to have been admitted for that purpose. If the tenant was holding more than half of the lot, the plaintiff ought to have asked for a partition.

Judgment reversed.

JOHNSON vs. GORMAN.

1. When an overseer comes to the house of his employer drunk, the employer is justifiable in refusing to turn over into his hands his plantation and property.
2. If an overseer demands additional stipulations to his original agreement, to the effect that the employer is to divest himself of all control and authority over his negroes, the owner is excusable for declining the engagement.
3. If the employer, within a reasonable time, offers to allow the overseer to enter upon his duties, and he refuses, suggesting as an excuse that he has made other arrangements, it is for the overseer to support the suggestion by proof.

Assumpsit, in Talbot Superior Court. Tried before Judge Worsell, at March Term, 1860.

This was an action of assumpsit brought by William F. Johnson against John R. Gorman to recover the sum of three

Johnson vs. Gorman.

undred and fifty dollars, the amount agreed to be paid by defendant to plaintiff for overseeing for the year 1858. The declaration alleged that plaintiff was ready, and offered to perform his part of said agreement, but that defendant refused to permit plaintiff to enter upon his premises and to perform and execute the contract aforesaid, and refused to pay him the amount or sum of money agreed to be paid to him as aforesaid, whereby plaintiff was damaged five hundred dollars.

Upon the part of the plaintiff, Jesse Nelson testified that about the last of December, 1857, or the first of January, 1858, he met up with plaintiff, who requested him to go with him to the house of defendant. When they got there, plaintiff called defendant out to the gate and demanded of him his negroes to go to overseeing for him. Defendant refused to let plaintiff have his negroes, saying that no such man could oversee for him; that he, plaintiff, had come furiously to oversee in a drunken frolic. Plaintiff did not deny the charge, but turned and rode off. Plaintiff told witness that he had moved to defendant's the evening before to commence overseeing for him, and defendant had refused to let him commence; that he had been that morning to town to consult a lawyer about what he must do.

Defendant introduced Abner M. House, who swore that on 3d January, 1858, he went with defendant to his house where plaintiff was; defendant said to the plaintiff, that when he came there a few days before to set in to oversee, that he acted in a very unbecoming and boisterous manner toward defendant. Plaintiff did not deny the charge. Defendant then said to him, that notwithstanding his unbecoming conduct, he was willing to pass it over if he, plaintiff, would come on and attend to his business as an overseer, as he had agreed to do (which agreement was admitted to be in writing.) Plaintiff declined to do so, unless defendant would give up to him the plantation, negroes and stock to his entire and exclusive control and management, which defendant refused, it being the contract between them. Plaintiff then said he could not oversee. Defendant then agreed to leave it to him to say who had violated the contract, as they had agreed to do, which plaintiff declined to do.

James Gorman, a son of defendant, swore that he was at defendant's when his wagon moved plaintiff and his family

Johnson vs. Gorman.

to the plantation; commenced overseeing for him about the last of December, 1857, or first January, 1858; plaintiff was drunk.

William A. Jones, for plaintiff, swore that he knew him; and did not regard him as a common drunkard; believes him to be a good overseer; that he rented a farm and worked it during 1858, and made from one hundred to one hundred and fifty dollars; plaintiff had followed overseeing six or seven years, and understood the business well; was a good overseer.

Here the evidence closed.

Plaintiff's counsel argued, or stated to the Jury, that they could deduct from the damages sustained by defendant's breach of the contract, the amount he had made on his farm in the year 1858.

The Court charged the Jury, who found for the plaintiff \$186 75.

Defendant moved for a new trial on various grounds. The Court granted the motion and ordered a new trial, on the ground that the verdict was against the evidence. To which order, granting a new trial, counsel for plaintiff excepted and assigns the same as error.

SMITH and BETHUNE, for plaintiff in error.

A. G. PERRYMAN & W. A. LITTLE, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We agree with the Circuit Judge, that the verdict in this case was strongly and decidedly against the weight of the testimony. Coming in the condition that Johnson did, who condemns Gorman for refusing to allow him to enter upon his duties?

The proof is, that Johnson is a good overseer, and that he is not a common drunkard. And it may be that there are men who get drunk occasionally, and yet, in the main, discharge their duties well. Still, I insist that any planter justifiable in refusing to turn over his plantation and property into the hands of an overseer drunk at the time, was a very bad beginning, to say the least of it.

Herring et al. vs. Rogers et al.

After taking professional advice, Johnson returned, but refused then to perform his contract, unless Gorman would agree to divest himself of all authority and control over his estate, and commit it to his sole dominion and mastery. This Gorman properly refused to do. His negroes were a trust committed to his hands, and he could no more divest himself of his superintendence over them than he could over his children.

It is suggested in argument that when Gorman offered to permit Johnson to enter upon the fulfilment of his contract, that he might have made other engagements. If so, it was an affirmative fact, which Johnson could have proven in justification of himself, for declining to do so, but one which Gorman could not disprove negatively.

HERRING *et al.* vs. ROGERS *et al.*

A new trial will not be granted on account of the admission in evidence of copy deed without proof of the correctness of the copy and without proof of the execution of the original, when the paper is produced under notice by the party against whom it is read, and it appears from the history of the trial that he claimed under it.

An estate to one during her life, and after her death to be *equally divided* between the heirs of her body, is not an estate tail, but an estate for life, with remainder to the children of the first taker.

When a Jury decides that a plaintiff in trover is entitled to recover, it is proper that their verdict should be for that which both parties in open Court have acknowledged to be an agreed substitute for the property, instead of the property itself.

Motion for New Trial, from Sumter County. Tried before Judge ALLEN, April Adjourned Term, 1859.

Matthew G. Hodges and his wife Elizabeth, formerly Elizabeth E. Herring, Mary J. Herring, Haywood Herring and

Herring et al. vs. Rogers et al.

Woodberry Herring, minors, suing by their next friend, Matthew G. Hodges, brought their action of complaint against John B. Herring for the recovery of five certain slaves.

On the trial, plaintiffs proved by one Rooks the value of the negroes sued for and their hire; that defendant was in possession at the time the suit was brought, and that defendant had claimed them as his a short time before suit was brought; also, that plaintiffs were the children of Herring's first wife, who was a Miss Moore, who died before 1856, in North Carolina, and that Herring married again before that year.

Rooks was asked if he had ever seen a deed from plaintiff's grandfather to the negroes in dispute? He answered, He had. He was asked its contents. Objection being made thereto, plaintiffs proved that they had given Herring notice to produce the deed. Rooks then stated Herring had several years before read over to him a deed then in Herring's possession, giving certain negroes to plaintiffs' mother for life, and to her children at her death. Defendant then produced a paper, which was read over to the witness by plaintiffs' counsel. The witness then testified that the paper read was, in substance, the same that was read over to him by defendant, as stated; that it read like it, and he believed it was a copy of the same paper. Thereupon, the Court permitted the paper to be read to the Jury—not, however, by virtue of its certificate, but as secondary evidence of the contents of the alleged original deed, defendant's counsel objecting thereto. Rooks further proved, that the negroes sued for were the children of Clara.

Bruer, introduced by plaintiffs, proved that he was the Ordinary of said county, and that defendant came to him before this suit was brought and asked his advice about taking out letters of guardianship for his, defendant's, children, stating that the negroes were, or had been, levied on by a *fi fa*. against him, and that they belonged to his, defendant's, wife and children under a deed of gift from some person not recollected.

The copy deed of gift referred to above purports to have been made by John E. Moore on the 18th day of January, in the year 1840, in New Hanover county, State of North Carolina, and that in consideration of the natural love and affection he has and bears for his daughter, Mary Herring, and

Herring et al. vs. Rogers et al.

of John H. Herring, he gives and grants to her and to the heirs of her body lawfully begotten of her, all and singular the following property: that is to say, three negroes; one negro woman by the name of Clarissa, about sixteen years of age, &c., which he does consent and agree to give, grant and bequeath unto his beloved daughter, Mary Herring, during her natural life, and after her death, to be equally divided between the heirs of her body lawfully begotten by her, which negroes he warrants and forever defends from himself and all other persons whatsoever, unto the said Mary Herring and to the heirs of her body, without any let or hindrance whatever.

It was admitted on the trial that the suit was settled as to the interest of said Hodges and wife by defendant's turning over Fanny, one of the negroes sued for, and agreeing to pay \$200 of plaintiff's counsel fees.

There having been a verdict for the plaintiffs, counsel for defendant moved for a new trial, on a number of grounds, which motion was overruled by the Court.

The only grounds taken in the motion which were insisted in this Court, are as follows:

1st. Because the Court erred in admitting the testimony of Rooks, and in allowing said copy deed to be read in evidence.

2d. Because the Court erred in charging the Jury that the copy deed of gift created a life-estate in Mrs. Herring, with remainder to her children.

3d. Because the Court erred in charging the Jury that Hodges and wife were entitled to recover the \$200 which defendant agreed to pay towards plaintiff's counsel fees, if the Court enforced the settlement made between them and defendant.

ANIER & ANDERSON; BLANFORD, for plaintiffs in error.

CAY & HAWKINS, *contra*.

the Court.—STEPHENS, J., delivering the opinion.

We will not send this case back for a re-hearing on account of the admission of the copy deed, for it appears to us,

Herring et al. vs. Rogers et al.

from the history of the trial, that it was produced by Herring himself under notice, and that he claimed under it. This, as against him, was sufficient guaranty of the correctness of the copy and of the execution of the original. No man can complain that other people should be allowed to assume the genuineness and correctness of a paper which he himself treats as being entitled to full credit, when his treatment of it does not depend on the report of witnesses, but appears in open Court. Rooks' testimony as to the deed—the deed itself afterwards being in evidence—is wholly immaterial. It did no good and no harm.

2. We concur with the Court below in holding that this deed did not create an estate-tail, but did give a remainder to the children of Mrs. Herring. The property was to be hers during her life, and after her death, it was to be *equally divided* between the heirs of her body. This language indicates a division—but *one* division—and that one an *equal* division. When one equal division is made, the operation of the deed is *exhausted*. That one equal division being accomplished, the deed retires from the scene, and leaves the property forever afterwards just where that division places it. This is incompatible with an estate-tail. An estate-tail consists in a provision for the transmission of the property from generation to generation till the blood is exhausted, but this deed contemplates no control over the course which the property shall take after the *one* equal division. Again: The *equality* of the division is incompatible with an estate-tail. An estate-tail requires a division, or rather a *succession* of divisions to be made, not *per capita* among those who take as this deed does, but *per stirpes*. The phrase, "heirs of her body," from the technical meaning which the Law has attached to it, would, if unexplained, import this succession of divisions among the successive generations *per stirpes*, but this deed shows that it contemplates but one division *per capita*, and that one must take place at the death of the first taker. There is no intention in it to control the transmission of the property from generation to generation, and therefore it creates no entailment. The provision is limited to such heirs of the body as may be in existence to take at that single, equal division.

3. The charge on the other point would have been better if it had been, that if the Jury should find Hodges and his

Durham vs. Holman.

wife entitled to recover, they should give them, instead of their legal share, that which the parties had acknowledged in Court to be an agreed substitute for that share. The effect of the charge upon the verdict was just this, although the charge was slightly different, and not correct. The error could not have hurt Herring, for the right charge would have produced the same result with a more inevitable certainty.

Judgment affirmed.

DURHAM vs. HOLEMAN.

1. Proof of the existence and execution of an original deed must be made before a copy thereof can be used as evidence.
2. Where illegal evidence has been admitted, it is error to make such illegal evidence the basis of a direction for the finding of the Jury.
3. When a deed is put in evidence purporting to have the name of one subscribed thereto as Justice of the Peace, as a subscribing witness, and a certificate from the Executive Department shows that no such person was Justice of the Peace in the county when the deed purports to have been executed, at that time, such proof, in the absence of rebutting evidence, is conclusive evidence of the forgery of the paper, and the fact cannot be weakened by a supposition.
4. The cutting of timber will not constitute an adverse possession to the land, nor will proof of particular acts at different times create a statutory title.
5. No matter what the acts of a defendant may have been, or what claim he may have asserted to the land in controversy, unless he has been in the actual possession of the land, by himself or his tenant, openly, notoriously, visibly and continuously for seven years previous to the commencement of the suit, under color of title and claim of right, the Statute of Limitations will not protect him against the true title.

When there is a conflict of the evidence, the Jury must so reconcile the whole as to make all speak the truth, if possible.

Durham vs. Holeman.

7. When the plaintiff's title or cause of action is plainly made out, and the defendant relies on a special plea in bar to defeat the recovery, such as the Statute of Limitations, the defendant must establish the facts to sustain the plea affirmatively beyond a reasonable doubt, else the verdict must be against the plea.

Complaint in Ejectment, in Sumter Superior Court. Tried before Judge ALLEN, at April Term, 1860.

This suit was brought by Durham against Holeman to recover lot No. 221, in the sixteenth district of Sumter county.

On the trial, the plaintiff introduced the grant from the State to himself, dated June 2d, 1843, and having shown the defendant to have been in possession at the commencement of the suit, closed his case.

The defendant was then sworn before the Court, and stated that there was a copy deed on record, (the original he had never seen or had,) purporting to have been made by plaintiff to one Josiah Bradley, and purporting to have been attested by one James G. Bird and one John R. Wells, J. P., and to have been executed in Wilkinson county, on the 1st day of November, 1829. Defendant stated, further, that he had searched for said deed in the Clerk's office and by asking May, (from whom defendant had a deed for half the lot in dispute,) and that May said the original deed had been lost or mislaid; also, had made diligent inquiries for Bradley, but could not find his whereabouts.

Defendant's counsel then proposed to read in evidence said copy deed from the record.

Plaintiff's counsel objected, on the ground that neither the existence nor the loss of the original had been proven.

The objection was overruled, and the copy deed read in evidence.

Defendant then read in evidence a Justice's Court *fi. fa.* in favor of one Sandford against James H. May, with the following entries thereon:

"Levied the within *fi. fa.* on 20 head of sheep, more or less. July 10th, 1845.

"JAMES T. HOLEMAN, L. C."

"Property sold for \$200, and bought by Francis Mills. The money claimed by an older execution. July 26th, 1845.

"JAMES T. HOLEMAN, L. C."

Durham vs. Holeman.

"Levied the within *f. fa.* on 27 head of sheep. August 1th, 1845. JAMES T. HOLEMAN, L. C."

"No property to be found whereon to levy this *f. fa.* October 17th, 1845. WM. FLOWERS, L. C."

"Levied the within *f. fa.* on two lots of land, Nos. 221 and 222, in the sixteenth district of Sumter county, as the property of James H. May. This 17th October, 1845.

"WM. FLOWERS, L. C."

"The levy on the within *f. fa.* on two lots of land, Nos. 221 and 222, in the sixteenth district of Sumter county, his day sold to James T. Holeman. Lot No. 221 sold for \$20 25, and lot No. 222 sold for \$30 6½, and money held up by older *f. fa.* December 2d, 1845.

"G. M. WHEELER, Dep. Sh'ff."

The Sheriff's deed, made in accordance with the above sale, was then introduced, dated October 15th, 1860. Also, a deed from James H. Hay to defendant for the north half of the lot in dispute, dated July 13th, 1842.

Defendant then introduced as witnesses Isaiah Ansley, John Willingham, Joseph M. Livingston, Wingfield M. Livingston, John D. McCay, Green Robinson and George C. Robinson, who testified, in substance, that said John Willingham, as tenant of defendant, went on the lot in dispute in the fall of 1848, and lived thereon with his mother until the latter part of that year, or the first of 1849, when defendant himself went on the lot, and has lived there ever since, there being no interval between Willingham's and defendant's possession; that there was a shelter, or cabin, on the lot in 1848, and a small horse or cow lot, some land deadened, (the witnesses variously estimate the quantity at from 5 to 60 acres,) and a good fence around the horse lot, which embraced about one-quarter or half an acre; said improvements made by defendant or his said tenant. One or two of the witnesses state that there was also a well dug on the place in 1848, and several thousand rails split, and that defendant made a crop there in 1849.

Defendant here rested his case.

Plaintiff, in rebuttal, introduced an exemplification from the Executive Department at Milledgeville giving the names of the Justices of the Peace elected and commissioned for

Durham vs. Holman.

the county of Wilkinson in the year 1829, and among which the name of John E. Wells does not appear. Plaintiff then introduced as witnesses A. W. Wheeler, Green M. Wheeler, B. M. Wheeler, A. M. Little, Moses Driver, Patrick Brady, Mrs. Driver, and P. H. Wooten, who testified, in substance, that defendant did not go into possession of the lot in dispute until the latter part of 1849 or the first of 1850, and all of them, except one or two, (who do not speak of Willingham,) state that Willingham did not go on the lot until the fall of 1849; that no one was on the place in 1848, although there was a shelter there and some deadening of land, and a small horse or cow lot, not used; that the land was not cultivated in 1848, nor until Willingham went there, except a small corner next to Mrs. Driver's place cultivated by A. W. Wheeler in 1849. Several of the witnesses state that the horse or cow lot was there in 1847, and some of the land was deadened also at that time, but no one was living on the place in 1847 or 1848 or cultivating it. Plaintiff also proved by Mary Till that Green Robinson lived ten months of the year 1849 in Houston county.

It appears, from the record, that this suit was brought on the 14th day of February, 1856.

The evidence having closed, the Court charged the Jury, and they returned a verdict for the defendant.

Plaintiff moved for a new trial on the following grounds, to-wit:

1st. Because the verdict is against Law and the weight of the evidence.

2d. Because the Court erred in admitting in evidence the copy deed purporting to have been made from plaintiff to Bradley.

3d. Because the Court, after giving in charge to the Jury several written requests of plaintiff's counsel, (which are set out in the record, but omitted here,) gave in charge the following requests of defendant's counsel, to which plaintiff excepts, to-wit:

1st. That if they believe, from the evidence, that Durham the plaintiff and drawer of the land, sold and made a deed to Bradley, then the plaintiff cannot recover in this suit.

2d. That the certificate from the Executive Department of the State, certifying to the Justices of the Peace who were commissioned and qualified in the year 1829, in which the

ne of the Justice to the deed does not appear, is not *absolutely conclusive evidence* that no such person was Justice of Peace in the State of Georgia, nor is it absolutely conclusive evidence that said deed is a forgery; but it is only evidence tending to prove that fact, and may or may not be it, as you may believe from all the evidence in the case on that point.

d. That if the Jury believe that the defendant commenced moving the lot of land sued for in 1847 or 1848, and continuously occupied the same for seven years, by cutting of over, building houses, deadening land and inclosing portions thereof, and by cultivating the same, then the verdict should be for the defendant—the Law being, that seven years peaceable and uninterrupted possession gives a statutory title to real estate in Georgia.

h. That if the Jury believe, from the evidence, that defendant, by himself or by Willingham, his tenant, held one acre of fenced land and deadened 30 or 40 acres of the same, built a house thereon, dug a well in 1848, and continued without interruption, to thus occupy, and claimed said land continuously, uninterruptedly, adversely for seven years, his title is good to the whole lot; if you believe the lot was sold to defendant at Sheriff's sale in 1845, the entry and sale being, in Law, a good color of title.

i. That if the Jury believe the acts and use of the lot in question by the defendant were of such a character as to create no doubt in the mind of Durham, if he had passed that title, that it was the purpose of Holeman to keep him out of the land, and that he was an adverse claimant, then such use of the land, in Law, constitute adverse possession, and if continued seven years, will ripen into a perfect title.

That it is the duty of the Jury to reconcile all the testimony and make each witness speak the truth, if possible; that if that is not possible, all the witnesses being credible, those who had the best opportunity of knowing are to be relied on.

That where there is an irreconcilable conflict in the testimony resulting in reasonable doubt upon the mind, then, like a criminal case, the defendant is entitled to the benefit of the reasonable doubt, and the Law will leave the parties where it finds them.

The Court refused to grant a new trial, and plaintiff excepted.

N. A. SMITH, LANIER & ANDERSON, for plaintiff in error.

HAWKINS & McCAY, *contra*.

By the Court.—LYON, J., delivering the opinion.

1. Before secondary evidence of the contents of a lost deed can be gone into, the existence and execution of such deed must be established by proof. This question was thoroughly investigated and fully settled by this Court in *Young vs. Bigelow*, decided at the March Term, 1860, of this Court at Atlanta. 1 *Phil. Ev.*, 452; 1 *Gr. Ev.*, §558, and *note*. It was error, therefore, in the Court to permit a copy, from the record, of the deed purporting to be from the plaintiff to one Josiah Bradley, to be read to the Jury as evidence, without proof of the existence and execution of the original.

2. The only evidence before the Court, that the plaintiff had sold and made a deed for the land to Bradley, was that of the copy deed before referred to, and as that deed was improperly admitted, and constituted no evidence of the fact—and it was error in the Court to charge the Jury, that if they believed, from the evidence, that the plaintiff had sold and made a deed to Bradley, the plaintiff could not recover.

3. The certificate from the Executive Department, showing that there was no such Justice of the Peace in the county of Wilkinson during the year 1829, as John R. Wells, who appears to be a witness to the deed on record, purporting to be from the plaintiff to Josiah Bradley, dated the first day of November, 1829, and whose name appears to such copy as a Justice of the Peace, in the absence of any other proof on the subject, was conclusive evidence that such deed was a forgery, and the Court erred in charging otherwise. When this proof was made, the onus was on the defendant to show, although there was no such Justice of the Peace in Wilkinson county at that time as John R. Wells, yet there was a Justice of the Peace in the State of that name, who attested that deed in his official capacity, that would have rebutted and overcome the effect of the certificate; but it cannot be broken down,

overcome, or weakened by a mere supposition, unsupported by fact.

Upon the subject of adverse possession, the Court charged the Jury, at the request of counsel for defendant :

"That if the Jury believe that the defendant commenced improving the lot of land sued for, in 1847 or 1848, and continuously occupied the same for seven years by cutting of timber, building houses, deadening land, and inclosing portions thereof, and by cultivating the same, then the verdict must be for the defendant—the Law being, that seven years peaceable and uninterrupted possession gives a statutory title to real estate in Georgia.

"That if defendant, by himself or by Willingham, his tenant, held one-half acre of fenced land, and deadened 30 or 40 acres of the land, built a house thereon, dug a well in 1848, and continued without interruption to thus occupy, and claim said land continuously, uninterruptedly, and adversely for 7 years, then his title is good to the whole lot; if you believe the whole lot was sold to defendant at Sheriff's sale in 1846, he said entry and sale being, in Law, a good color of title."

4. The cutting of timber is not such adverse possession as will even create a statutory title to land; nor will any of the specific acts or things enumerated by the Court, such as deadening the timber, clearing the land, building houses, making enclosures, digging a well, claiming the land adversely. The thing absolutely necessary to exist, to protect the defendant under the plea of the Statute of Limitations from the plaintiff's title, was wholly lost sight of by the Court in this charge, and that is, the defendant must not only commence to improve, &c., but he must, either by himself or his agent, go into the actual possession of the land, under claim of right, and continue in the actual and unbroken possession of the land for seven years continuously preceding the commencement by plaintiff of his suit for its recovery. It will not do for the defendant to dig a well, make a horse lot, split rails and deaden land, and then leave the land in that condition and return again after the lapse of a year or so, and then date his possession from the time he made the first improvement: in that case, the statute begins to run only from the time he returns and goes into the actual possession—not from the time he commenced to improve. Several of the witnesses testify that Holman did make improvements on the

Durham vs. Holman.

lot in 1847, or earlier, perhaps, as enumerated by the Court; but they also positively state that neither Holman or any one else occupied the land after these improvements were made, until Holman, the defendant, moved on the land about Christmas of 1849. Now, if these witnesses are to be believed, the defendant's statutory title was not complete. I am aware that there is great conflict of testimony on this point; for while one set of witnesses testified as I state, another set testifies equally positive that the actual possession commenced in 1848 and continued uninterruptedly to the bringing of the suit. We pass no opinion here as to the weight of the testimony, or which set of witnesses are to be believed, and which of them not. The Jury must pass on that question. I only refer to the evidence at all, for the purpose of showing the necessity of caution by the Court in instructing the Jury on the point. The Jury may have been satisfied that there was a break in the actual possession; but under the enumeration by the Court of the acts that would ripen into a statutory title, might have gone back to the first acts done and counted from that time, instead of from the time the possession commenced and continued unbroken.

The Court further charged, that if the Jury believe, from the evidence, that the acts and use of the lot in question by the defendant were of such a character as to leave no doubt in the mind of Durham, if he had passed that way, that it was the purpose of Holman to keep him out of his land, and that he was an adverse claimant, then such use and acts, in Law, constitute adverse possession, and if continued seven years, will ripen into a perfect title.

5. This charge is open to the same objection; for no matter what the acts of defendant may have been, or what use he made of the lot, or what claim he asserted, if he was not in the *actual possession* of the lot, by himself or his tenants, *openly, notoriously, and visibly, and continuously* for seven years previous to the commencement of the suit, under color of title and claim of right, then the Statute will not protect him: that is the test, and the only one. Besides, this charge left it to the Jury to determine what amounts to adverse possession. This is not their province. See *Paron vs. Bailey*, 17 Ga., 600.

We agree with the Court, that when there is an apparent

conflict of the evidence, the Jury must so reconcile the testimony as to make all speak the truth, and not impute perjury to any, if they can possibly do so; but when there is a conflict irreconcilably—as there most unquestionably is in this case—if the witnesses are all equally credible, then the Jury will credit those who had the best opportunity of knowing, or those who, from the manner of testifying, and the circumstances and facts upon which their recollection, as to times, dates, &c., are based. Indeed, it is very difficult to lay down any certain rule by which the Jury are to be governed. My own idea on this subject is, that as the Jury are to find the truth from this conflicting evidence, and as they are, or are supposed to be, impartial between the parties, that they should find as they shall be conscientiously impressed by the evidence, let that be the one way or the other.

The Court charged, further, that “when there is an irreconcilable conflict in the evidence resulting in reasonable doubt upon their mind, then, in this, like a criminal case, the defendant is entitled to the reasonable doubt, and the law will leave the parties where it found them.”

7. We hold the rule to be the reverse of that laid down by the Court. Here the plaintiff's title is indisputable. The defendant, to avoid the force of the title, and to defeat a recovery under this plain title, pleads the Statute of Limitations in bar of that right. The onus is on him to sustain his plea affirmatively. If there be a doubt—a reasonable one—the case is against him; and I am not so certain but that the same rule would apply in criminal cases. There is much authority for it, and none against it that I know of. But in a civil case, there is no question about the rule, and it stands on reason that it should be so. A party is not to be deprived of a plain right upon a mere doubtful claim of another.

In the *Lexington Insurance Company vs. Paver*, 16 Ohio, the Court recognizes the rule thus broadly: “It is the duty of the Jury, in all cases, to find the truth of the fact presented to them. But if, after hearing all the evidence on the point, it still remains doubtful where the truth lies, what is to be done? We have always held, under such circumstances, it is the duty of the Jury to resolve the doubt in favor of him against whom the charge is made. For instance, after hearing all the evidence, it remains doubtful whether the plaintiff sustained his cause of action, that doubt must acquit the

Gilmore vs. Moore.

defendant. So, if the defendant relies on a special plea, if it is doubtful whether the plea is sustained, a Jury cannot, with propriety, return a verdict sustaining the plea." So, in this case, if there be such a conflict in the evidence on the point whether the defendant has the statutory title, according to the rules here laid down, that the Jury cannot find the truth beyond a reasonable doubt, then they must find against the plea.

Judgment reversed.

GILMORE vs. MOORE.

I. If a Sheriff collect money on an execution and put it in a trunk under his bed, and it is stolen while he is asleep, he is liable to account to the plaintiff *in f. fa.* for the loss.

Rule against Sheriff, in Harris Superior Court. Tried before Judge WORRILL, at April Term, 1860.

This was a rule against Thomas H. Moore, Sheriff of Harris county, taken out at the instance of William B. S. Gilmore, to show cause why he should not pay over to said Gilmore the sum of \$400, principal, and \$65 71 interest, besides the cost, alleged to have been collected by said Sheriff on a *f. fa.* in favor of Gilmore against Timothy Collins and others, and which he failed and neglected to pay over to said Gilmore.

The Sheriff answered, that he collected the amount due on said *f. fa.* in March, 1859, and under the belief that plaintiff's attorney, P. O. Harper, Esq., resided in the town of LaGrange; wrote to him, directing his letter to that place, and said attorney, not residing at LaGrange, but at West

Gilmore vs. Moore.

Point, did not receive his letter. He kept said money safely until the night of the 8th April, 1859, locked up in a large trunk under the bed in his dwelling-house, slept in by defendant; and upon said night of the 8th April, and while respondent was sleeping in said bed, under which was the trunk, the said trunk, with the money therein, collected as aforesaid, was stolen out of the house of respondent by some person who entered his dwelling-house by raising the window at the back of the house; and the trunk, with the money, was thus secretly and feloniously stolen from respondent. The trunk was found the next morning about one hundred yards from the house, broken open, and all its contents gone except a few pieces of silver. There was in said trunk at the time about \$1,300, part of which was the money collected on said *f. fa.*, and belonging to plaintiff, in good, solvent bank-bills; and said respondent avers that, notwithstanding he made extraordinary exertions to detect the perpetrator or perpetrators of said felony, he was unable to do so, and said money was thus totally lost, &c.

Upon this showing, the presiding Judge discharged the rule against the Sheriff, holding, that under the facts and circumstances of the case, he was not liable.

To which decision counsel for plaintiff excepted, and assigned said decision as error.

INGRAM & RUSSELL, for plaintiff in error.

MOBLEY; BLANDFORD, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the Sheriff liable to account to the plaintiff for the money collected by him? Is he excused by the facts set forth in his return, in response to the rule?

Of course the defendant cannot be called upon a second time to pay the debt. Either the plaintiff or the Sheriff must sustain the loss. The Sheriff voluntarily assumes the responsibilities of his office. Amongst the rest, if he lose money which he has collected, he must account for it. The plaintiff has no option. He is compelled to entrust to the Sheriff the collection of his debt. He has no choice.

Morris et al. vs. Munroe.

It is conceded, and the Books show it, that by the English Law, the Sheriff is liable. We see nothing in our Statutes or the condition of the country to excuse him. His mode of keeping money was very insecure, to say the least of it. An accidental fire would have consumed it. Thieves did break through and steal, without doing any act of violence, or even disturbing the slumbers of the officer. It was the least he could have done to keep an iron safe, or some secure place, for the preservation and protection of money and the valuable papers constantly in his custody.

Judgment reversed.

MORRIS *et al.* vs. MUNROE.

1. Where parties have conflicting claims, depending upon a Law point, and they compromise them, each is bound by the settlement, whether the law point turns out to have been for him or against him.

In Equity, from Lee Superior Court. Decision by Judge ALLEN, September Term, 1859.

This case having before been up to this Court, a statement of the facts of it will be found, in substance, in the 28th Vol. *Supreme Court Rep.*, p. 597. This Court reversed the decision of the Court below, and on the return of the remittitur, counsel for complainant moved to amend the bill as follows:

Your orator shows that he was induced to enter into said contract, or agreement, upon the assurance being given him by the attorney at Law of said defendants, as well as one Grier, a skillful lawyer, that the deed under which defendant claimed from Rawson Cain was not void, by reason of the

fact it was made, whilst orator was in the adverse possession of said lot of land, but that the same was a valid and good deed, and was a paramount title for said premises. And, your orator further shows, that since the filing of this bill the Supreme Court, at its recent session at Atlanta, in a case pending in said Court, *Edward Grisham vs. William O. Webb*, decided that the Common Law principle against barter, try and selling pretended titles was in force in this State, and had been at all times since our adopting Statute, and that a deed made by a vendor whilst the premises were in the adverse possession of another was void, and conveyed no title. Your orator says that, having been deceived as to the law controlling his rights in the case, and acting under a mistake as to the law, he submits to your Honor whether it is just or equitable for him to be required to comply with said agreement, the more especially as the defendants would not be injured by its cancellation, but have all the rights they had before said agreement was made.

The Court allowed this amendment to be made, and on the strength of it ordered the former injunction to be retained till the hearing of the cause, and refused defendant's motion to dismiss the bill as amended.

Counsel for defendant excepted thereto, and assigns the same as error.

LANIER & ANDERSON; MCCAY & HAWKINS, for plaintiffs in error.

VASON & DAVIS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

This amendment does not add the slightest Equity to the original bill. The very essence of the settlement was the compromise of the rights that depended on the law point, and neither party ought to be allowed to set aside the settlement because he may have found out that the law point was in his favor, and that he made a bad trade in conceding anything on account of the uncertainty of it. The uncertainty of the legal question is the very foundation stone of that settlement. In any other supposition, one party must have conceded the

Doe ex dem. Dearmond vs. Roe et al.

land and the other must have got the land—an entire loss or an entire gain. If the parties had made a settlement upon the basis that the Law was in favor of Munroe beyond all question, Munroe must have got the entire land by the settlement. If they had made a settlement upon the basis that the Law was, beyond all doubt, against Munroe, the other party must have got the entire land by the settlement. Neither of these results was reached, because neither of these bases was assumed. The true basis of the settlement was the uncertainty of the Law, and the settlement was a compromise. The result could not have been reached from any other starting point, and we, therefore, know that the starting point was the uncertainty of the Law. Mr. Munroe sold his chances, and, though they appear to be worth more now than they were then, he must abide by the sale. This is the fate of all traders. The bill ought to have been dismissed.

Judgment reversed.

JOHN DOE *ex dem.* of **WILLIAM P. DEARMOND, et al.** *vs.* **RICHARD ROE, Casual Ejector, &c., ISAAC BROOKING, tenant.**

1. The plaintiff, in an action of ejectment, is not entitled to recover when one of the lessors has conveyed, by deed, his whole legal and equitable right in another lessor whose right to recover has been barred by a former recovery in the statutory form of action against the same defendant for same lot of land, and the demises from these two being all the title exhibited by the plaintiff.

Ejectment, in Quitman Superior Court. Tried before Judge PERKINS, and New Trial granted, at May Term, 1880.

- * The plaintiffs in error brought this action to recover lot of

See, vs. dec. Dearmond vs. Roe et al.

land No. 79, in the 8th district of originally Lee, now Quitman county.

On the trial, plaintiff read in evidence the plat and grant to Boswell Cook, of Treadwell district, Richmond county. Also, a deed from Boswell Cook to W. P. Dearmond, made in Green county, and dated September 26th, 1829.

John N. Green testified, for plaintiff, that in 1851 and 1852 defendant disclaimed title, and said he would give up the land when the true owner came, but would not give it up to Neel, (one of the plaintiffs,) because Neel had a forged deed to it.

Nathan Gilbert testified to the same facts, and the plaintiffs here rested their case.

Defendant then read the evidence of James A. Green, Surveyor-General of the State of Georgia, who testified, that the original Book returned to his office by the Commissioners of the Land Lottery of 1827, shows that the lot in dispute was drawn by Roswell Cook, of Treadwell district, Richmond county; that the plat is recorded to Boswell Cook, of said district and county. The first letter of Cook's Christian name has evidently been erased on the original Book, so as to make it Roswell, instead of Boswell; does not know whether the change was made by the Commissioners, at the time of recording the name, or subsequently, by some other person.

Isaac Newell testified, that he knew a man named Roswell Cook who lived in the city of Augusta, Richmond county, from about the year 1822 till about the year 1830; knew said Cook in Connecticut in 1818, from which State he moved to Augusta; witness was very well acquainted in Augusta and vicinity, and knew no such man as Boswell Cook.

Jessie S. Finney, of Southington, Connecticut, testified, that Roswell Cook died in that place in 1855, and that he is one of the appraisers of the estate of deceased; he found among Cook's papers a paper purporting to have been executed by the Governor of Georgia, under the seal of that State, dated November 5th, 1851, conveying to Boswell Cook a tract of land situated in the 8th district of Lee county, Georgia, and being No. 79; the survey being dated January 22d, 1827; this paper was handed over to the administrator of Roswell Cook.

John W. Quill testified, that he knew Roswell Cook in

Dec. 23 1868. Dearmond vs. Roe et al.

Southington, Connecticut, in 1818; said Cook shortly thereafter removed to Augusta, Georgia; witness found him in Augusta in 1823, and they both resided there till 1828, when witness went to Milledgeville; went back to Connecticut in 1831, and found Mr. Cook there, where he continued to live till his death; witness had heard Cook say, whilst they were together in Augusta, that he had drawn a lot of land in the Land Lottery of Georgia, the land drawn being in Lee county; never knew any such person as Boswell Cook.

William V. Kerr testified, that he has resided in Richmond county nearly forty years; has never known such a man as Roswell Cook, but has a faint recollection of knowing a man named Roswell Cook; Treadwell district is now the 1st or 2d ward of Augusta.

John Mann testified, that, having been Clerk of the Superior and Inferior Courts of Richmond county, he was well acquainted with the people of that county; he knew a man in Augusta in former years by the name of R. Cook, and has a strong impression that the R. stood for Roswell; said Cook was from the North, and witness thinks returned North before his death.

The defendant next read a certificate from Benj. T. Hall, Clerk of the Inferior Court of Richmond county, stating that the Tax Digests of said county from the years 1830 to 1837 inclusive, had no such name on them as Boswell Cook, but the names of R. Cook and R. Cook and Co. did appear on said Tax Digests.

Plaintiff introduced in rebuttal a certificate from A. J. Boggus, Surveyor-General of the State of Georgia, dated December 9th, 1869, in which he states that the original books of drawing and other evidence in his office show that Boswell Cook, of Treadwell district, Richmond county, was the drawer of the lot in dispute; also, a certificate of same date from H. J. G. Williams, Secretary of the Executive Department, stating that the Land Books in that Department show that Boswell Cook was the drawer of said lot; said Boggus also testified to the facts stated in his certificate, stating, however, that one book, known as the Numerical Book of the Office, bears palpable evidence of the name having been altered from Boswell to Roswell.

Plaintiff also introduced several witnesses, who testified that defendant disclaimed title to said lot, and said he was

Doe. ex dem. Dearmond vs. Roe et al.

holding it under the Statute of Limitations, but had not been in possession six years. One or two of the witnesses testified that they attested a quit claim deed from one Trotter to defendant, and that said Trotter stated at the time he executed said deed that he had no title; also, that no consideration for the deed was paid by defendant.

The evidence having here closed, the Jury found a verdict for the plaintiffs.

The defendant's counsel moved for a new trial on the ground that the verdict was against Law and the evidence. The Court granted a new trial, and counsel for plaintiff accepted.

HOOD & BEALL, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—LYON, J., delivering the opinion.

My recollection is, that this case was decided upon quite a different state of facts from those that appear in the Reporter's statement. In fact, I know that we ordered a judgment of affirmance upon the following understanding, in addition to the reported facts, although the Record itself is correctly reported: That the defendant put in evidence an application of a judgment previously had in that Court in statutory form of action at the suit of John R. M. Neel against the defendant, in which there was a recovery by the plaintiff of the same lot of land in controversy in this suit, when introduced and put in evidence a deed from the said John R. M. Neel, dated previous to the recovery in the suit by Neel against Brookings. These facts appeared to the Court, I have no recollection whether by agreement of counsel or from the mistake of the Court alone in looking to the decision in the same case reported in 27th Ga., 52. So understanding the facts, the opinion of the Court in accordance therewith, protesting that, if we were mistaken, I cannot say what would have been the judgment of the Court in the facts, simply as stated. I certainly, on those facts alone, should not have decided that the verdict should be disturbed.

My recollection, further, is, that when this testimony of the defendant came in, the plaintiff amended his declaration by adding a new demise from John B. M. Neel. There was also a demise from Dearmond for the use of Neel.

On these facts, the plaintiff was not entitled to a verdict.

Not on the demise from Dearmond, because the deed from him to Neel conveyed the legal title out of him. Nor on the demise from Neel, because the judgment recovered in the former suit barred his right to recover. See *Sims vs. Smith*, 19 Ga., 125. Nor on the demise from Dearmond, for the use of Neel, because the deed to Neel conveyed the equitable, as well as the legal title to Neel. So a new trial was properly allowed by the Court below. Of course, if it be true as was suggested in the argument, that the verdict in the first case was rendered in consequence of Brooking's adverse holding of the premises at the making of the deed by Dearmond to Neel, and the ruling of the Court, that that fact would defeat the plaintiffs' right of recovery, that, in my opinion, would make a very material difference; but that does not appear in the record. I think, too, the plaintiff, in that case, would have trouble in getting along at Law.

Judgment affirmed.

DENMEAD vs. GLASS et al.

No contract for the sale of goods for the price of ten pounds sterling and upwards, is valid under the 17th section of the Statute of Frauds, except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain, or in part of payment, or some note in writing be made of said bargain, signed by the parties to be charged by such contract, or their agents thereto lawfully authorized. A delivery of goods to the railroad is not a delivery to the purchaser, in the purview of the 17th section of the Statute of Frauds; the railroad not being the agent of the buyer "to receive and accept" the same.

Complaint, from Dougherty County. Tried before Judge ALLEN, December Term, 1859.

Edward Denmead brought his action against Glass, Laws & Co., on an account for 150 sacks of superfine flour, sold by plaintiff to defendant in error at \$2 50 per sack.

It was proved, on the trial, that Edward Jones, as one of the firm of Glass, Laws & Co., being in Marietta, at the plaintiff's place of business, gave a verbal order for the flour in March, 1858. Defendants resided in Albany, Ga. The flour was shipped by plaintiff at Marietta, on the Western Atlantic Railroad, to defendants.

The plaintiff having here rested his case, counsel for defendant moved for a non-suit, on the ground that the contract was on, which was an open account, (for goods sold,) on a verbal order, was void under the 17th section of the Statute of Frauds.

The motion was sustained by the Court, a non-suit awarded, and counsel for plaintiff excepted.

VASON & DAVIS, for plaintiff in error.

SLAUGHTER & ELY, contra.

By the Court.—LUMPKIN, J., delivering the opinion.

To make a sale of goods, wares and merchandise, for the price of ten pounds sterling or upwards, good, under the seventeenth section of the Statute of Frauds, the buyer

Burton vs. Black.

must accept of part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain must be made and signed by the parties to be charged by such a contract, or the agents thereto lawfully authorized.

There has been no compliance with the Statute in this case. The railroad, by which the flour was shipped, was not the agent of the purchaser, and if the goods were not received and accepted by Glass, Laws & Co., no right of action accrued to the plaintiff. (See *Lloyd & Pulliam vs. Wright, Griffith & Co.*, 20 *Ga. Rep.*, 574.)

BURTON vs. BLACK.

1. An estate to one generally, without expressing what estate, and then adding, that if he shall die without children, then over, is not an estate tail, and the limitation over is valid.
2. When the direction is, that all the property which shall be found remaining at the death of the first taker, shall go over, the description of what goes over is sufficiently certain.

Complaint for Negroes, in Schley Superior Court. Tried before Judge WORRILL, at April Adjourned Term, 1860.

This was action of complaint brought by Robert Burton against William A. Black for certain negro slaves.

The only question in this case arises upon the last Will and Testament of Mrs. Eliza Burton, the mother of plaintiff, and to whom the negroes sued for formerly belonged.

The substance of the bequest may be found in the opinion of the Court.

1. Plaintiff proved that Benjamin Burton, who is mentioned

Burton vs. Black.

in said Will, died sometime in January, 1859, and that he never had any child or children.

Plaintiff further proved, that after the death of said Benjamin Burton, and before suit brought, he demanded said negroes of defendant, which he refused to deliver, and that they were in possession of defendant.

Plaintiff then introduced and read in evidence a deed of marriage settlement between said Eliza Burton and one Charles W. Smith, her last husband, by which deed his, Smith's, marital rights were excluded, and did not vest or attach in or to any of the property of said Eliza.

Plaintiff here closed.

Defendant's Counsel moved for a non-suit, or to dismiss plaintiff's suit, on the ground that the bequest contained in the last Will and Testament of Mrs. Eliza Burton, of said property, to Robert Burton, was void, and that an absolute, unconditional estate in fee in the same vested in Benjamin Burton.

After argument, the presiding Judge granted the motion, holding that plaintiff had no title; that the limitation over in and by said Will to Robert Burton was too remote; that the legal effect of the words used created a perpetuity, and that Benjamin Burton took an absolute estate in and to said property.

To which decision counsel for plaintiff excepted, and assigned for error said ruling and order.

MCCAY & HAWKINS, SMITH & POU, for plaintiff in error.

BLANDFORD & CRAWFORD, B. HILL, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. This case turns solely upon the validity of the limitation over expressed in the 5th item of the Will. Its validity is attacked on two grounds, of which the first is, that it creates an estate-tail, which, by our Act of 1821, is converted into a *fee-simple* in the first taker, to the destruction of the limitation over. The question, whether or not an estate-tail is created, is always resolvable into two others, of which one is, What persons are intended to take the property? and the

Burtis vs. Mack:

other is, Do these persons constitute a class having succession from generation to generation, down to the end of the blood? The cases which have caused such difficulty and conflict of decisions, are those where the persons intended to take the property are to be ascertained, not by designation in the conveyance, but by *inference*. This inference is generally associated with a limitation over, the inference itself being, that those are intended to take the property who are designated to prevent its going over. The inference is a sound one, only when carefully applied and put under certain restrictions. There should be great care in adhering strictly to the description of the persons who are to prevent the property from going over; for whatever persons these may be, the only just inference is, that those *same persons*, by the *same description*, are intended to take. If property is given to A. for life, and if he shall die without issue, then over to B., the issue of A. are the persons whose existence is to prevent the property from going over to B.; and the just inference is, that the "issue," without further description, are intended to take it. This, therefore, is equivalent to a gift to A. for life, remainder to his issue, if any, and if none, then over to B.; or under the rule in *Shelley's case*, a gift to A. and his issue, which is an express entail, issue being a class which has succession from generation to generation, till the lineal blood is exhausted. Here, "issue" prevents the property from going over, and "issue," by the same description, no more no less, are inferred to have been intended to take it. But if property is given to A. for life, and if he shall die "without issue living at his death," then over to B., the issue of A. "living at his death" are the persons who are to prevent the property from going over, and the just inference is, that only such issue are intended to take it as shall be living at A.'s death. Here, there is no estate-tail, for "issue living at the death of A.," cannot embrace persons in future generations. These two extreme cases clearly illustrate the principle on which the intention to create an estate-tail is reached by implication, or, more properly, by inference. To apply it to the case before us: The 4th item of the Will gives the property to Benjamin, and then the 5th declares that it shall go over to Robert, if Benjamin shall die "without children." Now, if this were a case (as I shall presently show it is not) where it is allowable to draw an inference of

to who is intended to take the property, from a designation of those who are to prevent it from going over, the utmost inference would be, that at the death of Benjamin, his "children" are to take, if any, and if not, then Robert is to take. That is to say, it would be an estate to Benjamin for life, remainder to his children, if any, but if none, then to Robert. Can this possibly be made an estate-tail? Benjamin, and after him, his children are the persons, if any such there be, who constitute a class having succession from generation to generation, until the blood is exhausted. The term "children" does not describe any such class. In its proper sense, it includes only the next generation to Benjamin, and to make it include more, there must be something in the Will (as there is not) to show that it is used in a broader sense. There are many books which say that the term must be also extended so as to include others, when there are no children proper to whom it can apply; but Mr. Jarman denies the principle, and denies that it is sustained by any well adjudicated case. For my own part, I think Mr. Jarman is right; but even if the principle be conceded, it never extends the term "children" beyond such representatives of children as are in life when the time arrives for children to take; that is to say, "children," in this case, can include only children proper, or, in default of these, such representatives of children as were in life at the death of Benjamin. The persons who take under the description of children, in the largest possible sense of the term, must all be in life at the death of Benjamin. The conveyance exhausts itself on a single generation, and creates nothing which bears a resemblance to an estate-tail. This view would suffice for this point in this case, but there is another which is applicable to the point, and applicable also to the case of *Tennille vs. Ford*, decided during the present Term. I shall here apply it to both cases, because I can do so in one opinion more briefly than in two. The principle of ascertaining, by inference, the persons who are intended to take the property, is not applicable to either of these two cases, because in both, those persons are designated. An obvious restriction upon the principle of reasoning by inference is, that resort to it shall be had only in the absence of expressed intention. The case of *Gov. Troup's Will*, decided at the last Savannah Term, will clearly illustrate this restriction, and the importance of it in arriving at

the true intention of testators. That Will makes a gift to George M. Troup, jr., and his heirs—a *fee-simple*—with the exception, that if he shall die “without lineal descendants,” it shall then go over. It was contended in that case, that, as the “lineal descendants” were to prevent the property from going over, they were intended to take it, and that that intention made it an estate-tail, lineal descendants constituting a class which has succession from generation to generation. Such an inference is opposed to the clear words of the Will, for the Will makes full provision for two events, one or the other of which was obliged to happen, and its provisions are therefore perfectly exhaustive of all contingencies, leaving no room for inference. One of these two events is, the first taker’s dying *without* lineal descendants, and the other is, his dying *with* them. These two exhaust the possibilities, and there is full provision for each of them. The estate of the first taker is to be a *fee-simple*, excluding lineal descendants and everybody else, filling the whole field, and leaving no room for anybody but the first taker, with his absolute and perfect dominion over the property during life, and after death, *unless* he shall die *without* lineal descendants. If he dies *without* lineal descendants, the property is to go over, but if he dies *with* them, the property is to be in the situation just described—is to constitute a *fee-simple* estate in the first taker, to the exclusion of everybody else. The Will disposes of the whole estate in all possible contingencies, by *express words*, excluding all occasion or place for inference. Sometimes an inference may be so strong as to overcome express words, as when “or” is construed “and,” under the strong inference that a testator would not exclude the issue of his donee from all benefit of the gift, when there is no reason to do so; but there is no such inference in this case as in those like it. It is not a true statement of the case to say that the lineal descendants are to prevent the estate from going over, the more accurate statement is, that their absence is to terminate the estate of their ancestor: and in this, there is good reason and perfect conformity with the general conduct of mankind. The object of the testator was to provide directly for two persons only—his own son, who is the first taker, leaving him to provide just as he might please for his issue, if he should have any, and the remainderman on whom he was not willing to trust in the hands of his son.

The issue of his son no doubt constituted a strong motive in shaping the form of the gift, but he provided for them just as five parents out of six provide for the issue of their sons, and that is, by giving property to their *father*, leaving them to take their chances as his heirs or legatees. The testator did not desire to terminate the estate of his son, neither during his life nor at his death, if he should die leaving those who would have natural claims on him, because he could safely trust his son with his own children; but there was the remainderman whom he was not willing to trust in the hands of his son, and for whom, therefore, he made provision himself, in the event that the son should not leave those for whom he would be under natural obligation to provide. Gov. Troup's Will creates a *fee-simple* in his son, determinable upon his dying without lineal descendants; and, he having died without such descendants, the estate terminated and went over under the limitation. So, in this case, the 4th item of the Will gives the property to Benjamin Burton, the son of the testatrix, and as no less estate than a *fee-simple* is expressed, *that item* creates a *fee-simple* in Benjamin. This rule of construction, which makes every estate a *fee-simple*, unless a smaller one is expressed, is derived from that very Act of 1821, which is invoked to defeat this limitation over. True, the Act converts into unconditional *fee-simple* estates, all estates expressed in such terms as will pass an estate tail in real property by the Statute of Westminster Second. True, also, our Courts have held that estates tail by inference or implication are included, as well as those within the letter of the Statute of Westminster. True, yet again, the English Courts, in cases relating to real estate, would always infer that an estate tail was meant, and not a *fee-simple*, determinable upon condition, unless the estate to the first taker was expressed to him and *his heirs*. From all this, it might be argued that the Act of 1821 preserves the same distinction between an estate to one generally, without expressing what estate, and an estate to one and *his heirs*, so far as the distinction can affect *estates tail*. I cannot think so. The English Courts, in arriving at estates tail by implication or inference, always proceeded on the principle of being guided by the *intention* of the grantor. They applied the English rules of construction for that purpose, and one of these was, that an estate in real property to one generally, gave an es-

tate for *life* only. Now our Act of 1821 not only converts estates tail into *fee-simples*, but it also enacts a *new rule* of construction, introducing it with a recital that the *intention* of the parties to conveyances is often *defeated*, and great injustice done by the rules of construction then prevailing. That new rule is, that an estate to one generally shall be held a *fee-simple*. I cannot doubt that it intended to subject the English rules of construction to the modifying operation of this new rule, in all cases, as well where the question should be estate tail or not, as in all other matters wherein the decision depended on the *intention* of parties. Under the English rule, an estate to one and his heirs is a *fee-simple*. Under our new rule, an estate to one generally, is a *fee-simple*. Under the English rule, their *fee-simple* is not cut down to a *fee-tail*, by attaching to it a condition that it shall go over if the first taker dies without issue; it remains a *fee-simple*, but is determinable on the event named. Now, shall our *fee-simple* be cut down by attaching to it the very same condition? To hold so, is to reverse the intention of our Act, for it was intended to *enlarge* estates; but this construction of it makes it *restrict* them. I must think that whenever a *fee-simple* is first conveyed, whether conveyed in such terms as the English rule requires for the purpose, or in such as our Statute has made sufficient for the purpose, it will not be cut down into any smaller estate, by attaching to it a condition which would not have that effect under the English rule. Our law makes a *fee-simple* more easy of creation, and it cannot consistently make it also more easily degraded from its rank. If the bequest to Benjamin in this 4th item were expressed to him and his heirs, it would not create a *fee-simple* more effectually under our law than it now does by being expressed to him, and I think the only effect of the 5th item is to attach a condition to that *fee-simple* by declaring that it shall terminate and go over, if the first taker dies "without children." The children are not intended to take in any event, except to take their chances as heirs or legatees of their father. The estate is to be just what the fourth item leaves it, a *fee-simple* in the first taker, unless he dies *without* children. This view is equally applicable to the case of *Tennille vs. Ford*. In both cases the estate is a *fee-simple*, determinable upon condition, and in this case the event having happened on which it was to determine, it must go over under the limitation.

Barton vs. Black.

2. The other ground of attack on the validity of this limitation is, that the description of the things which are to go over, is too vague and uncertain to be carried out. The dictum is, that all of the "property which shall be found remaining at the death of Benjamin," shall go over to Robert. It was said that this meant only such property as should be found remaining in Benjamin's *possession* after the exercise of his rights over it, including a power of disposition. If that were the meaning of the words, it would certainly be as amounting to nothing at all; but we do not think that is the meaning. There is no power of disposition conferred on Benjamin, and the property which is to go over, is restricted to that which may be found remaining in his *possession*, but it includes all which shall be found remaining *where*. We think these terms are the fair equivalent of *whichever*, which, in common language, would include all of the estate that had not been given to Benjamin, though the words would not be technically applicable to a fee taking effect after the determination of a prior fee. We think this dictum is good, and that the plaintiff below was entitled to recover.

Judgment reversed.

*Spencer vs. Holman.***SPENCE vs. HOLMAN. SPENCE vs. HOLMAN.**

1. In an action for recovery of negroes under the Act of December 27th, 1847, the Jury returned a verdict for the specific property sued for: *Held*, That the verdict in that form of action was a proper finding.
2. It is not error in the Court to grant a rule *né si* for a new trial.

Motion to recover Negroes, in Randolph Superior Court.
Tried before Judge LAMAR, at the May Term, 1860.

B. S. WORRILL and E. H. BEALL, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—LYON, J., delivering the opinion.

Richard H. Spence commenced suit under the statutory form of action prescribed by the Act of December 27th, 1847, against David Holman for the recovery of five negroes, returnable to the Superior Court of Randolph county. On the trial, the cause was submitted to the Jury, with the agreement of the parties, that when the Jury had agreed on the verdict, they might either retain it until the next morning, or deliver it to the Clerk of the Court. The Jury agreed upon, and signed, by their foreman, the following verdict:

"We, the Jury, find for plaintiff return of the negroes and five hundred dollars for the hire of said negroes.

(Signed)

"A. A. GAMBLE, Foreman,"

delivered the same to the Clerk of the Court, and dispersed. The Court, on motion, set aside the verdict, and declared a mis-trial, on the ground that the form of the verdict was illegal; that is, that the recovery was for the negroes specifically, instead of the value thereof.

To which judgment plaintiff excepted.

We think the verdict under the Statute was a proper finding, and ought to have been so taken and held by the Court. The language of the Statute authorizing this form of action is in these words: "The form of action for the recovery of personal property may be as follows, to-wit: That form of action the plaintiff has thought proper to follow, and under it.

Spence vs. Holman.

he is entitled to recover the property specifically sued for. It was for that the remedy was given, if we are to judge of the intention of the Legislature from the words used, and we must do so when they are plain and unambiguous; and these in this Statute are so. This form of action was not intended to take the place of the action of trover or other forms of action, but the plaintiff was left at liberty to follow it or any other form known to the Law. It must, therefore, be governed by rules peculiar to itself, and the leading one is, that the recovery is to follow and be controlled by the Statute; and the recovery in this case was of the property sued for, and therefore good.

We are aware that the profession has not given this construction to the Act, but these are its words, and by them the Court must be governed.

2. Counsel for the defendant, out of the abundance of caution, or apprehending that the verdict, as rendered, might be deemed a compliance with the Statute, moved the Court for a rule *ni si*, calling on the plaintiff to show cause why a new trial should not be granted in said cause. This the Court allowed, and defendant excepted. There was no error in the granting of the rule *ni si*, at least the plaintiff's rights were not affected by it, and the question involved in it will all more properly be considered on the hearing to make the rule absolute.

The two questions made were brought up by different bills of exceptions, but tried together. In the one, excepting to the judgment setting aside the verdict, the judgment is reversed, and in the other the judgment must stand affirmed.

Wright vs. Watson.

WRIGHT vs. WATSON.

1. Executions issued from judgments obtained under the provisions of the Act of 5th March, 1856, entitled "An Act to enable persons who have claims against trust estates, to recover said claims in a Court of Law," not specify the property on which the same is to be levied, or the same will be illegal and void.

Illegality, from Lee County. Decided by Judge PERKINS.
March Term, 1860.

A *fiari facias*, endorsed "*alias fi. fa.*" in favor of the plaintiff in error, against the defendant, "to be levied of the trust property of said Mary A. Johnson, in the hands of said Jesse H. Watson, trustee," had been levied by the Sheriff on a slave as a part of such trust property.

The defendant made affidavit that said *fi. fa.* was proceeding illegally, upon the following grounds:

That said *alias fi. fa.* is not a copy of the original, said to be lost, and that the "*alias*" was issued without notice to defendant.

2d. That said *fi. fa.* is an *alias fi. fa.*, and could only be issued upon a judgment of revival, which was not the case of the original judgment. The same was a Common Law judgment, recovered upon a promissory note given by defendant as trustee.

3d. That the *fi. fa.* does not specify the property to be levied on in compliance with the Act of the Legislature of the 5th March, 1856.

4th. That the slave levied on is not the undivided property of said Mary A., but is the property of Mary A. and her children, and is not subject to be seized as aforesaid, not being specified in said *fi. fa.*

5th. That there is no judgment in existence on which said *fi. fa.* has issued, the same having been lost or destroyed, and that no copy has been established; that the original judgment was against defendant, simply as trustee, without being against the trust property, or specifying any trust property.

On the hearing, the Court sustained the illegality, and counsel for plaintiff excepted.

Wright vs. Watson.

HAWKINS, for plaintiff in error.

VASON & DAVIS, *contra*.*By the Court.*—LYON, J., delivering the opinion.

This was a Common Law execution against the property of a married woman, in the hands of her trustee, issued from a judgment rendered upon a suit, or proceeding, authorized by the Act of 5th March, 1856, entitled, "An Act to enable persons, who have claims against Trust Estates, to recover said claims in a Court of Law, and to prescribe the manner in which the same may be done." The execution having been levied, the trustee filed an affidavit of illegality to the same, on various grounds, among others, this: "That the *f. fa.* does not specify the property to be levied on, in compliance with the Act of the Legislature." The Court below, on hearing the same, sustained the affidavit of illegality, and quashed the writ.

The fifth section of the Act, on which this proceeding was based, expressly enacts, that "All executions issued upon judgments rendered under the provisions of this Act, shall specify, in the body of the execution, the property on which the execution is to be levied, and it shall be levied on no other." This execution does not specify the property on which it is to be levied. It therefore could not legally be levied on any property, was illegal and void, and the Court properly so held.

Judgment affirmed.

Carter vs. Davis.

CARTER vs. DAVIS.

1. When a person bargains land in this State, giving a bond for title, and dies in another State as a citizen thereof, his administrator appointed in that State can maintain suit for the purchase money in this State, and can make a valid deed to the vendee.

In Equity, from Marion County. Decision by Judge WORRILL, at Chambers, 30th day of November, 1859.

This bill was filed by defendant in error to enjoin the collection by suit at Law of certain promissory notes given by the defendant to Matthew M. Carter, the husband of plaintiff in error, in his lifetime, (since deceased,) for certain tracts and parcels of land in the bill described.

The complainant alleged, that at the time of the purchase and the giving said notes, the vendor executed to him a bond for titles only, and subsequently moved to the State of Florida, and there died, without executing to him a deed for the land; that he left a widow and several minor children as his heirs, and that the former was proceeding to collect said notes without being able to execute to him legal conveyances for the land, her husband having died out of the State, leaving no legal representation or heirs at law residing in it.

This bill was returnable to the March Term, 1860, and there was appended to it an affidavit by complainant, that he would have presented it to the Chancellor in time to have made it returnable to the previous Term, but for the fact that his brother, Zachariah Davis, had been very sick, and owing to the attention of G. O. Davis on him, said G. O. having been employed as counsel for complainant, and only counsel, it could not be sooner prepared.

The injunction restraining the Common Law suit having been granted, according to the prayer of the bill, the defendant filed her answer, admitting all the facts charged, except that she denied her want of authority to execute legal titles to complainant for said land. She exhibited letters of administration on the estate of her deceased husband obtained in the State of Florida, and asserts that under the laws of that State, (reciting sections 1 and 2 *Thompson's Digest*,) she, as administratrix, is duly empowered to make the titles

Carter vs. Davis.

in question. She further answers that she did execute, as administratrix, a deed for said land to complainant, to be filed in the Clerk's office of the Superior Court of Marion county, to be delivered to complainant on his paying said notes. A copy of the deed is attached to the answer, with the certificate of the Clerk, showing the said deed to have been filed in his office and duly recorded.

To this answer is appended the affidavit of Wm. D. Elam, stating that complainant in the bill has been in possession of said land ever since the 1st February, 1857.

On the coming in of the answer, the defendant moved to dismiss the injunction, on the following grounds:

1st. That said injunction was improvidently granted by the Court, in this: that the complainant did not show a good cause why it was not filed in time to have had the defendant served.

2d. That the children being minors, are improper parties, and cannot be made parties in this bill.

3d. That the complainant has a full and complete remedy at Law for all he claims, and that he is in possession of the land for which he claims the notes were given and has not complied with the bond.

4th. There is no Equity in the bill; if so, the answer swears it off.

5th. And that said injunction was granted improvidently, in this: that there was no certificate of the Clerk that there was a bond with good and ample security for the eventual condemnation money, together with all future costs, as required by Law and the rules of Court before the same was sanctioned by the Court, there being a judgment at Common Law.

The Chancellor refused the motion on all the grounds taken, and counsel for defendant excepted.

ELAM & OLIVER, for plaintiff in error.

BLANFORD & CRAWFORD, *contra*.

By the Court—STEPHENS, J., delivering the opinion.

The substance of this bill is, that there is no person who

Buckner vs. Chambliss.

can make a title to the land, and that it would be inequitable to enforce the collection of the notes without giving Davis the title, which was the consideration of the notes. The reply which Mrs. Carter makes in her answer is, that there is a person who can make the title, and that she is that person; or rather, her reply is, that she has already made it. We have no hesitation in saying that the reply is a good one, and that the injunction ought to have been dissolved. She not only states that she is a person authorized to make the title, but she shows her authority—letters of administration on the estate of the obligor, granted in the state of Florida. Our Act of 1850, (*Cobb's Dig.*, 518,) authorizes the administrator of a deceased vendor of land, with bond for title, to make a deed to the vendee, whenever judgment for the purchase money shall be obtained. Now, whenever this administratrix obtains judgment on these notes, the deed which she has already made will become a perfect title under this Statute. It makes no difference that she is a foreign administratrix, for another Act of the same year, (*Cobb's Dig.*, 841,) gives her, as the foreign administratrix of a citizen of Florida, who died there, the right to sue on any cause of action which he had in this State at the time of his death, and to use all the Common Law and statutory remedies which are of force in this State, and applicable to the case.

Judgment reversed.

BUCKNER vs. CHAMBLISS.

1. Proof of prior possession of land for more than seven years is sufficient to authorize a recovery by a plaintiff in ejectment against a mere wrong-doer.
2. The attornment of the plaintiff's tenant to defendant without the knowledge of plaintiff, and such tenants, constituted possession under defendant, in not

such adverse possession as will create a statutory bar to plaintiff's right of action.

3. When land is levied on by the Sheriff under executions that are subsisting liens and unpaid liens against the land, and is fairly and legally sold and bid off by three persons jointly, such sale is not affected by the previous fraudulent conduct of one of them in obtaining a note against a debtor, suing out attachment and levying the same on the land, especially when the land is not sold under such attachment, nor by the procurement or contrivance of the one of the purchasers who sued out the fraudulent attachment.
1. When three persons buy land on joint account at Sheriff's sale, their agreement to do so, and not to bid against each other, does not vitiate the sale.
3. When land is fairly sold by the Sheriff, under subsisting executions, and the purchasers at the sale pay up all of the liens, or all that the Sheriff requires, and gives their note to the Sheriff for the balance, and the Sheriff executes a deed to the premises, the non-payment of the balance of the bid will not vacate the title. The Sheriff takes the note at his peril.

Complaint for Land, in Sumter county. Tried before Judge ALLEN, at the April Adjourned Term, 1859.

This suit was brought on the 17th day of February, 1857, by the administrator of Jesse Harris against Reason Buckner, the plaintiff in error, to recover lot of land No. 210, in the 26th district of originally Lee, now Sumter county.

The plaintiff in the Court below introduced, on the trial, A. M. D. King, who testified, that Jesse Harris was in possession, and claimed to be the owner of the premises in dispute in the years 1847-'48, and for several years before, and up to the time he went to Louisiana, in 1848; he returned for a short time in 1851 or '52, and again in 1854 or '55; at the time he left, he left James Baker as his agent, in possession of the lot; defendant was in possession of the lot at the commencement of the suit, and had been since 1851 or '52; Harris' possession extended back as far as the year 1840.

The plaintiff having here rested the case, counsel for defendant moved for a non-suit, which the Court refused, and the defendant excepted.

Counsel for defendant then offered in evidence a deed from the Sheriff of Sumter county for the premises in dispute to James Salter, William Morris and Wright Brady, dated the 22d day of December, 1849, and which recites that the premises specified had been levied on, and were sold at Sheriff's

Buckner vs. Chambers.

sale on the 7th day of August, 1849, by virtue of three *fi. fas.*, two issued out of the Superior Court of Sumter county, one in favor of Thomas Applewhite, against Jesse Harris, and the other in favor of the officers of Court, against Jesse Harris; and the third issued out of the Inferior Court of Sumter county, in favor of officers of Court against said Harris.

These *fi. fas.* were then also put in evidence. The one in favor of Thomas Applewhite is for the principal sum of \$280, besides interests and costs, and shows the levy was made on the 29th day of June, 1849; also, that the lot was sold at the time recited in the deed, for the sum of \$300, \$46 62 of which were applied to the costs of levy and sale, and the two cost *fi. fas.*, leaving a balance "held up" in the officers' hands of \$253 37. The other two *fi. fas.* were for \$15 and \$13 12 respectively, and had endorsed on them the same entries as the first, as to the levy and sale.

The defendant also put in evidence a deed from James Salter, William Morris and Wright Brady for the said lot to Reason Buckner, said defendant, dated the 24th day of December, 1855.

Counsel for defendant then offered to prove that after the Sheriff's sale in 1849, James Baker, without being ejected from the premises by the Sheriff, attorned to and rented the premises from B. Easterling, who purchased the same from Morris, Salter and Brady, and held the same as his tenant for the balance of the year 1849 and '50, until Buckner took possession in 1851.

This was objected to. The objection was sustained by the Court, and defendant excepted.

Plaintiff then proved by Green M. Wheeler, the former Deputy Sheriff, that he levied the *fi. fas.* upon the lots, as shown by the levies, as Deputy Sheriff; that he levied the Applewhite *fi. fa.* by the directions of Gen'l Warren, one of the attorneys for the plaintiff therein; and at the same time levied the two *fi. fas.* in favor of the officers of Court, which he found in the Sheriff's office. The sale was fair, so far as witness knew. After the sale, Salter, one of the purchasers, came to him and told him he believed the Applewhite *fi. fa.* was paid off, and that he had an attachment on the land, that in such event, would come in and take the surplus of the money, and proposed to give the purchasers' notes for all

over the expenses of sale and costs due on the three *fi. fa.* which witness took, no money being paid except the costs and expenses of the sale as above, which was \$46 and some cents. Judge King, attorney for plaintiff in Salter's attachment, instructed witness to hold the Sheriff's deed until he should be paid thirty dollars and the Jury fee, his fees and costs in the attachment; and the deed was not given up and the credit made upon the attachment judgment until some two or three years ago, and since the commencement of this suit, when the same was done by T. C. Sullivan, as his attorney, and by his directions.

Plaintiff also put in evidence the record of the said attachment case, which shows that on the 2d day of February, 1849, James Salter made the affidavit on which the attachment issued, stating therein that Jesse Harris was indebted to him in the sum of \$125 75, with interest thereon from the 25th day of June, 1844.

The note copied in the attachment declaration is payable at one day after date to R. W. Oats, or bearer, for \$175 75, made by Jesse Harris, and dated the 24th day of February, 1844. This attachment was levied on the said lot on the 12th day of February, 1849.

Defendants admitted, for the purpose of a trial, that the Applewhite *fi. fa.* had been paid by Jesse Harris, as to the principal and interest, and that at the time of the sale nothing was due thereon except the Court costs.

Plaintiff then introduced the evidence of Susan Hamill, who testified, by commission, that she was present when Mr. Salter applied for the note; Mrs. Oats refused to give Mr. Salter the note, because she had received satisfaction for it; and after that, he requested Mrs. Oats to let him look over her papers for a certain paper; after getting the note, Mrs. Oats said to him that if the note should ever come against her it would run the old man Oats crazy; Salter told her that the note should never injure her; Salter said he knew (a) lot of land he could sell with the note—naming the Green Pond lot, which James Baker was then living on—"which he had no more right to than he, Salter, or any other person, which Salter said he could sell with that note and make something;" it was not by her consent he got the note; did not recollect as to anything being said about what the note was given for, or the amount of the note at that time; witness

Buckner vs. Chambliss

cannot read or write; the conversation took place either in the latter part of 1848 or the first of 1849; according to her recollection, the note was made payable to Mr. Oats by Jesse Harris; he told witness the note never should hurt her; all she knows about the note is what she heard Mr. Salter and Mrs. Oats say; does not know the amount of the note.

Patrick Brady, introduced by plaintiff, testified, that he was present on one occasion when James Salter applied to old Mrs. Oats, old man Oats being a very old and infirm man, near one hundred years old, lying on the bed—for Jesse Harris' note; the old lady did not wish to let him have it, because there was some difficulty about the note on account of payment, failure of consideration, or something of the kind, does not remember what; Salter said Harris had run away and would not come back, and the money could be made out of the Green Pond lot; told Mrs. Oats the note should never come against her or the old man; that they should not be hurt; this was before Salter got the note; Salter did not get it then, but witness afterwards had a conversation with Salter, and he told him he had got the note, and intended to make the money out of the Green Pond lot by attachment; don't think he ever told Wright Brady or William Morris what Salter said, or how he got the note; he told witness he did not pay anything for the note.

William Ooker, in behalf of defendant, testified, that defendant, Buckner, went into the actual possession of the premises in dispute the last of 1851 or first of 1852, and that there was in cultivation on the premises from 90 to 100 acres, worth \$1 50 per acre for rent; that he never knew the premises before defendant's occupation of them.

William Easterling also testified, for defendant, that he bought the premises of Wright Brady, James Salter and William Morris in 1849, took their bond for titles, and gave his note to them for the purchase money, which he took up; in 1849 he rented the land to James Baker for the balance of the year, and afterwards sold it to him and transferred the bond to him, who sold to Buckner and also transferred said bond; and Morris, Brady and Salter made Buckner a deed in pursuance of said bond thus transferred; the defendant had put up a small house worth from \$35 to \$50.

The test money here closed, and at plaintiff's request, in writing, the Court charged the Jury as follows:

Buckner vs. Chambliss.

1st. If the Jury believe, from the evidence, that Salter was guilty of a fraud, and that Brady and Morris knew of it, they stood in no better position than Salter.

2d. If the Jury believe, from the testimony, that Morris, Brady and Salter combined not to bid against each other, then the sale was void.

3d. To make a Sheriff's sale good, the purchase money must be paid; and if the Jury believe that Morris, Brady and Salter never paid up the bid, then they acquired no title.

4th. If the Jury believe that at the time Buckner bought, Harris was in possession by his tenant, Baker, then Buckner is bound, and charged with notice of whatever right or title Harris had.

5th. A purchaser at Sheriff's sale, void on the ground of public policy, cannot be purged by being for the benefit of defendant, unless with his consent.

To which charges defendant, by his counsel, excepted.

B. HILL; LANIER & ANDERSON, for plaintiff in error.

MCCAY & HAWKINS, *contra*.

By the Court.—LYON, J., delivering the opinion.

1. The plaintiff, in the Court below, relied, for recovery of the premises in dispute, upon proof of prior possession. The proof showed that he had been in possession of the lot sued for from 1840 to the time he moved to the State of Louisiana, and that he then left one James Baker in possession, as his tenant. On this proof, the defendant was not entitled to a non-suit. Prior possession will prevail in ejectment over a subsequent one acquired by mere entry, without any lawful right. *Johnson vs. Lancaster*, 5 Ga., 39.

2. The attornment of Baker, the plaintiff's tenant, to the purchaser at Sheriff's sale, and his subsequent possession of the premises under the purchaser, could not be such adverse holding against the plaintiff as would create a statutory bar to his right of action, and the Court properly rejected the evidence.

3. The conduct of Salter, in getting possession of the note on Harris from Oats, suing out an attachment upon it, and

causing the land to be levied on, was most wrongful and fraudulent; but that conduct of his did not lead to the sale of the lot; that is, the land was not sold under that attachment, but under executions that were open, unpaid, and subsisting liens against the land, over which Salter had no control. The land was levied on by the Sheriff of the county, having been pointed out by the plaintiff's attorney in one of the executions, for that purpose. To all this Salter was no party in the levying upon, pointing out, or sale of the lot, nor did he have any interest in the executions selling the lands. The attachment he had sued out was not then in judgment, but the land was sold fairly and in good faith by the Sheriff for the purpose only of producing satisfaction of the liens levied. The sale was a good one, and Salter's fraudulent conduct in procuring the note, suing out the attachment, &c., could not, and did not, affect that sale, and he was as competent to buy the land at such sale as any one. The charge of the Court, in this respect—that if Salter was guilty of a fraud and Morris and Brady knew of it, they stood in no better position than Salter—was erroneous; for if the Court referred to Salter's fraud in respect to his attachment, it had no relevancy, and did not affect the sale or his purchase, as we have said, if the Court referred to any fraud of Salter's in the purchase, there is no evidence of any to warrant the charge.

4. The proof was, that Morris, Brady and Salter bought the land jointly at the Sheriff's sale; in fact, the Sheriff's deed is made to them. The Court charged the Jury, "That if they combined not to bid against each other, the sale was void." This was error. It was equivalent to saying that persons could not buy property at Sheriff's sale on joint account, for every agreement to buy on joint account implies an agreement that they will not bid against each other. There is no such rule of Law as that. If they had used any means unfairly or fraudulently to prevent other persons from bidding for the property, that would have defeated the sale as to them; and that is what we suppose the Court intended to charge; but stated broadly as the charge is in the record, it makes a very material difference.

5. After the sale was over and the land bid off by Morris, Brady and Salter, Salter remarked to the Sheriff that he thought the Applewhite *et. al.*, one of the three under which

land was sold, was paid off, and if it should so turn out, thought he would get the balance of the money on his account, and proposed to the Sheriff to give the Sheriff the purchaser's note for the balance of the bid, after paying off expenses of the sale and the costs due on the three *fi. fas.* as the Sheriff consented, and the purchasers paid up the fees and costs due on the three *fi. fas.*, amounting to something like \$41, and gave the Sheriff their notes for the price of the sale. Afterwards, and after he had made the deed to the purchaser, but before he had delivered it to the purchaser, King, the attorney of Salter in the attachment, he Sheriff notice not to turn over the deed until his fees attachment—amounting to some thirty dollars—was paid, and the Sheriff held the deed accordingly, and it was not until two or three years previous to the trial. In proof, the Court charged the Jury, that “to make a sale good, the purchase money must be paid, and if you believe that Morris, Brady and Salter never paid the bid, then they acquired no title.” Under the facts of the case, the instruction was erroneous. The land was sold, as we have shown, and when the Sheriff executed the title passed away from the defendant in execution to the plaintiff in this suit; and if the Sheriff chose to execute the title without getting the money, that is a question between him and the purchaser, there being no fraud in the sale. The defendant in execution and the plaintiff here affected by the non-payment of the money. It makes no difference with him, for the Sheriff is responsible to him for the proper application of the money, and when he is called to account, it will be no reply for him to say that he did not get it. He is bound to have it. This is obliged to be so in this case, when the purchasers acted in good faith and paid up a part of the bill, how could the sale be so good a part, and bad as to part? The purchasers paid what the Sheriff required, and had he required the full amount, the presumption is, that they would have paid the

not reversed.

AVERITT, Adm'r, vs. POPE, Adm'r.

1. The Act of 1850, authorizing foreign administrators to sue in this State, applies as well to actions *ex delicto* as to actions *ex contractu*.

Complaint, from Lee County. Tried before Judge ALLEN, March Term, 1859.

This was an action of complaint brought for the recovery of a slave by Matthew Averitt, against Robert Freeman.

Pending the suit, both parties died, and afterwards, Sarah Averitt, as administratrix of Matthew Averitt, deceased, and John H. Pope, as administrator of Robert Freeman, deceased, were made parties plaintiff and defendant.

On the trial, the plaintiff offered in evidence an exemplification from the Probate Court of the county of Russell, and State of Alabama, showing that on the 27th day of July, 1857, Sarah Averitt was duly appointed administratrix of the estate of Matthew Averitt, deceased; which exemplification was in due form.

Defendant's counsel objected to the same going in evidence, on the ground, that under the Act of 1850, a foreign administrator was not authorized to bring or maintain such an action as this, it being an action *ex delicto*.

Which objection was sustained by the Court; and afterwards, when the plaintiff closed her testimony and rested her case, the Court, on motion of counsel for defendant, granted an order non-suiting said case on the above ground.

To which counsel for plaintiff excepted.

VASON & DAVIS, for plaintiff in error.

HAWKINS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

The Act of 1850, authorizing foreign administrators to sue in this State, (see *Cobb's Dig.*, 341,) warrants no such distinction as that taken as the ground of the non-suit, between actions *ex contractu* and actions *ex delicto*. The Act speci-

McDuffie vs. Stewart & Fountain.

some certain causes of action for which the foreign administration may sue, and then adds, "and any other cause of action against citizens of this State." The non-suit is plainly against the Statute.

Judgment reversed.

McDUFFIE, Adm'r, vs. STEWART & FOUNTAIN, for another.

the issue was one of fact only, and there is ample testimony to justify the verdict, a new trial should not be granted.

Re Facias to Revive Judgment, in Marion Superior Court. Tried before Judge Worrill, March Term, 1860.

was a *scire facias* to revive judgment by Stewart & Fountain, for the use of Charles D. Stewart, against George McDuffie, administrator *de bonis non* of Benjamin Story, deceased.

defendant showed for cause why said judgment should be revived—

Because the same had been fully paid off and satisfied by said Benjamin, in his lifetime, to the Sheriff of Marion County, or the plaintiff, to-wit: in September, 1845.

Because, if not paid off, execution on said judgment was sued out and is now outstanding and in force by virtue of the entries and returns thereon.

Because more than seven years have elapsed since the date of said judgment, and if no execution has heretofore been sued out thereon, the same is, by Act of 1856, terminated and held fully paid off and satisfied.

Because *autre facias* was heretofore sued out, in 1851.

McDuffie v. Stewart & Fountain.

against the then administrator of Benjamin Story, deceased, and the same was dismissed and plaintiffs non-suited, and having failed to recover the same within six months thereafter, the plaintiffs are thereby perpetually barred by the Statute.

At the trial, plaintiffs offered and read in evidence copies of the original writ and process, and service thereof by the Sheriff, and copies of the confession of judgment made by defendant's (there being two defendants in the original suit, Benjamin Story and Enoch Story,) confession made at November Term, 1848, of the Inferior Court of Marion county, for \$240 64, with interest and cost of suit; which copies were established by order of the Court at May Term, 1851, in lieu of the original, which had been destroyed by the burning of the Court-house.

Plaintiffs then proved by the Clerk of the Inferior Court, that he was acting Clerk, and had been for several years; that he had often examined the papers of file in his office, and had never seen any *f. fa.* in said case; that if any such paper had been in the office, he probably would have seen it.

Plaintiffs here closed.

Defendants then proved that Benjamin Story had considerable property about him in his life-time; that he owned about 800 acres of land, and had several negroes, and that judgments to the amount of four or five hundred dollars might have been made out of him.

Cross-examined: Benjamin Story, in his life-time, made over to his son, F. P. W. Story, several negroes; that his son was a single man, and off at the time attending lectures; that the negroes thus made over to him remained at his father's, and were not taken away; Benjamin Story died in 1847, leaving two or three thousand dollars worth of property, which was distributed among his heirs at law. Defendants further proved, that there was a receipt among the papers of Benjamin Story, purporting to have been given by the former Clerk of the Inferior Court of said county to said Benjamin for the costs in said case.

The Jury found for the defendants; whereupon, counsel for plaintiff moved for a new trial on the following grounds:

1st. Because the verdict was contrary to Law.

2d. Because the verdict was contrary to the evidence.

3d. Because the verdict was contrary to the charge of the Court.

McDuffie vs. Stewart & Fountain.

After argument, the presiding Judge granted the motion and ordered the new trial; whereupon, counsel for defendants excepted.

BLANDFORD & CRAWFORD, for plaintiff in error.

MILLER; JOHNSON & SLOAN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

It is not complained that this case was not fairly submitted to the Jury. And in the exercise of their undoubted right, they found the judgment satisfied, which is sought to be reversed. To justify granting a new trial, that verdict should have been strongly and decidedly against the weight of the evidence. So far from this being so, we must say, that, in our opinion, the preponderance of proof is in favor of the plaintiff.

The plaintiff may not have been paid; but to have stood for so many years, both before and after the death of the defendant, witnessed the division of his property amongst his family, and made no attempt to collect this debt until the defendant was dead, until eleven years after the defendant's death, requires some explanation; and then, too, there are no payments by the Sheriff to the plaintiff—the receipt is cost by the Clerk, &c. Surely the Jury had a right to assume that the debt was discharged.

Dawson et al. vs. The Merchants' & Planters' Bank.

DAWSON et al. vs. THE MERCHANTS' & PLANTERS' BANK.

1. It is not error in the Court to refuse an injunction of executions on such facts alleged in the bill as would not constitute a defence to the original suit on which the judgments were had, from which the executions issued.
2. When the Sheriff alleges as an excuse for not making the money on executions placed in his hands for collection, that the defendants notified him of their intention to file a bill to enjoin the executions, and he thought the bill would be sanctioned: such showing is not a good excuse. The Sheriff is in contempt, and the Rule is properly made absolute against him.

Rule against Sheriff, from Sumter County. Decided by Judge ALLEN, at April Term, 1860.

Samuel Dawson, Sheriff of Sumter county, was called on by rule nisi to show cause why he should not pay to the defendant in error the principal and interest due on a *f. fa.* in favor of The Merchants' & Planters' Bank against John V. Price, principal in said *f. fa.*, and Thomas C. Sullivan, security on stay, which had been in his hands for collection. John E. Sullivan, John V. Price and Thomas C. Sullivan came forward, on the hearing, and asked leave of the Court to be made parties defendants to said rule, and insisted that said rule ought not to be made absolute for the reasons set forth in a bill in Equity then in Court, and which bill was in substance, as follows:

John C. Sullivan, Thomas C. Sullivan and John V. Price, complainants, alleged that on the 5th day of February, 1858, said John E. made his promissory note for \$1,698 06, payable to the order of said Price sixty days after date, at The Merchants' & Planters' Bank of Savannah, which was endorsed by said Price for the accommodation of the maker. On maturity, said note was sued to judgment in the name of said Bank. There was a stay of the *f. fa.*, on which said Thomas C. Sullivan became the security. The maker and endorser had been sued to judgment in separate actions, and at the April Term, 1860, a rule absolute was had against the said Dawson, Sheriff, for failure to make the money due on the *f. fa.* founded on the judgment against said John C. Sullivan. The complaints alleged, that since said judgment

Dawson et al. vs. The Merchants' & Planters' Bank.

and rule absolute were obtained, they have been informed that said Bank had no title to, or interest in, said note; but that it really belonged to Patten, Hutton & Co., of Savannah, who, they charged, had fraudulently caused the suit to be brought in the name of said Bank, to prevent the maker and endorser thereof from setting up certain legal and equitable defences thereto, and that said complainants never ascertained or had any knowledge of this fact until the 13th day of April, 1860. They alleged, further, that said Patten, Hutton & Co. were engaged, in 1856 and '57, as Warehouse and Commission Merchants and Cotton Factors, in Savannah, Georgia, and that in order to get the patronage of said John C., who was about to engage in the business of buying and selling cotton at Americus, they agreed, in consideration that he would send them all his cotton to Savannah for sale, they would perform all the duties and assume all the liabilities of consignees towards him; and in pursuance of such agreement, he purchased large quantities of cotton, and shipped the same to them, said cotton amounting to about one thousand bales; that said Patten, Hutton & Co. sold the most of said cotton as soon as they received it, and long before the maturity of the bills drawn thereon, thus depriving him of the benefit of the rise in the cotton market, and that they sold said cotton at least half a cent under the market price, and in disregard of his rights in the premises; that they pursued this course either to meet their own large pressing liabilities or to defraud him, and that he had thereby been injured and damaged three thousand dollars; the note was given as a part of said cotton transactions, but not as a final settlement between the parties.

The prayer of the bill was for discovery, account, &c., and for an injunction to restrain the proceedings at Law.

The parties aforesaid further insisted, that the foregoing facts being true, that said Bank having no interest in said judgments; that Patten, Hutton & Co. being indebted to said John C. as above stated the rule ought not to be made absolute. It was represented that said bill for injunction, &c., had been presented to the Court for sanction, which had been refused, and that they had thereupon filed their bill of exceptions for a hearing before the Supreme Court. They asked leave of the Court to make up an issue to try the question as to the ownership of said judgments.

Dawson et al. vs. The Merchants' & Planters' Bank.

The motion to make defendants in said judgments parties to said Rule, was refused by the Court.

The Sheriff Dawson, then showed for cause the facts stated in said bill, and that being about to proceed to make the money on said *f. fa.* by levy and sale, defendants therein notified him that the said *f. fa.* was the property of Patten, Hutton & Co., and not of said Bank; that said *f. fa.* was in fact paid, and that they intended to file a bill to enjoin the collection of the same, and he supposed the injunction was granted, until informed by defendants' attorneys to the contrary; that he acted in good faith in the matter, and failed to execute the process because he supposed the injunction would be granted on the representation of the foregoing facts.

The Rule was made absolute, and defendants excepted.

HAWKINS, for plaintiffs in error.

SCARBOROUGH, *contra.*

SULLIVAN et al. vs. MERCHANTS' & PLANTERS' BANK et al.

In Equity, from Sumter County. Decided by Judge ALLEN, at Chambers, 17th April, 1860.

John E. Sullivan, Thomas C. Sullivan and John V. Price filed their bill in Equity, alleging that, on the 5th day of February, 1858, John E. Sullivan made his promissory note for \$1,698 06, payable to the order of John V. Price, six days after date, at the Merchants' & Planters' Bank of Savannah, which note was endorsed by said Price for the accommodation of said Sullivan; that on maturity, said note was paid to judgment in favor of said Bank; there was a stay on the *f. fa.*, on which Thomas C. Sullivan became the debtor. At the April Term, 1860, a rule absolute was taken against the Sheriff of said county for failure to make the money on the *f. fa.* against said parties.

It is further alleged, that since said judgment and rule absolute, the complainants have been informed that said Bank had no title to, or interest in, said note, but, that said

Dewees et al. vs. The Merchants' & Planters' Bank.

y belonged to Patten, Hutton & Co., of Savannah, who, charged, had fraudulently caused the suit to be brought in the name of said Bank, in order to prevent the maker and receiver thereof from setting up certain legal and equitable defenses thereto, and that said complainants never ascertained had any knowledge of this fact until the 18th day of 1860. It is further alleged, that the said Patten, Hutton & Co. were engaged, in 1856 and '57, as Ware-house Commission Merchants and Cotton Factors, in Savannah, Georgia, and that in order to get the patronage of commission, John E. Sullivan, who was about to engage in the business of buying and selling cotton, at Americus, they were in consideration that said complainant would send all cotton to them at Savannah for sale, they would perform duties and assume all the liabilities of consignees to him, and in pursuance of such agreement, complainant shipped large quantities of cotton, and shipped the same in 1856 and '57, said cotton amounting to about one hundred bales. It is charged that said Patten, Hutton & Co. sold the most of said cotton as soon as they received it, before the maturity of the bills drawn thereon, thus depriving complainant of the benefit of the rise in the cotton price also, that they sold said cotton at about half a cent below the average price for cotton at that time, in utter disregard of complainant's rights in the premises, and that they sold the cotton in the manner aforesaid, either to meet their pressing liabilities or to defraud complainant, and by he has been injured and damaged three thousand dollars. The note was given to meet the draft of commission in the Bank of Savannah, and said Patten, Hutton & Co. fraudulently, as is alleged, refused to apply the note as agreed upon. It was given as part of the consideration of the bill is for discovery, account and settlement, or an injunction to restrain the proceedings at law, and a decree of the Court can be had in the premises. It is requested that the Court do justice to the complainants, and refuse to sanction the bill on this state of facts, and award counsel for complainants excepted.

& BROWN, HAWKINS, for plaintiffs in error.

UGH, contra.

By the Court.—LYON, J., delivering the opinion.

The Merchants' & Planters' Bank obtained several judgments against John E. Sullivan, as maker, to which Thomas O. Sullivan became security, on a stay of the execution, and John V. Price, as endorser, on a note, dated 5th February, 1858, made by John E. Sullivan, and payable to the order of John V. Price, at The Merchants' & Planters' Bank in Savannah, for the sum of \$1,698 06, and endorsed by John V. Price. From these judgments several executions issued against the defendants, and were placed in the hands of Samuel Dawson, the Sheriff of Sumter county, for collection. At the term of the Court to which the executions were returnable, the plaintiffs moved a rule against the Sheriff to show cause why he had not collected the money, and why he should not pay over the amount due on the same to the plaintiff. The defendants filed their bill against the plaintiff in execution and against the firm of Patten, Hutton & Co., praying an injunction against the collection of the executions, and asking an account as to Patten, Hutton & Co. The Court refused the injunction. To this refusal the defendants, or complainants, excepted. This forms the ground of error in one bill of exceptions.

The defendants then asked to be made parties to the rule against the Sheriff, and tendered an issue, setting up the same facts as charged in the bill. The Sheriff also made a special showing, amounting, in substance, to this: That he was about to make the money, but that defendants "notified him that they intended to file their bill in Equity, and he supposed the injunction would be sanctioned;" and he submits "that he has acted in good faith, and only failed to make the money because he thought, under the facts, as they are stated in the bill to exist, the Court would enjoin the fact."

The Court overruled the showing, and made the rule absolute against the Sheriff for the amount due on the executions. To which decision the Sheriff excepted, and that forms the grounds of another bill of exceptions. The two were tried together.

1. Was the Court right in refusing the injunction? We think so, most unquestionably. The facts set out in the bill

would have been no defence to the original suit, had it been pending in the name of Patten, Hutton & Co., as plaintiffs, instead of the Merchants' & Planters' Bank. The grounds of the Equity of the bill are, that the cotton was sold before the maturity of the drafts drawn against the cotton, thereby depriving the complainants of the benefit of the rise of the market, and no rise in the market prices is alleged; besides, in the absence of instructions, the acceptors had the right to sell the cotton on its arrival, for their reimbursement or protection, whether the bills were mature or not; in fact, it was their duty to do so. Another ground is, that the cotton was sold for about a half cent under the average prices for cotton at that time. That might be true, and yet this cotton be sold for every farthing it was worth. But what excuse does this bill set up for going behind a settlement of all these transactions? This note sued on was given in settlement for the balance due by the complainant, growing out of the transactions between the parties, in which the equities originated. Was the complainant surprised or taken advantage of in the settlement? The bill does not so charge; on the contrary, it is silent on that subject.

2. Was the Court right in overruling the showing, and in making the rule absolute against the Sheriff for the amount due on the executions? Most certainly. It was the duty of the Sheriff to have made the money. He neglected that duty, and was liable to this rule. What the defendants' equities were, was none of his business. He had no right to judge or think anything about them. It was his duty to obey and execute the process of the Court, and when he failed to do so, he was in contempt.

Judgment affirmed.

Crummey et al. vs. The Mechanics' & Savings Bank.

CRUMMEY *et al.* vs. THE MECHANICS' & SAVINGS BANK.

1. Where the mortgagor of land has no title to the land, but only a bargain for it, with part payment of the purchase money, the mortgagee cannot have the aid of a Court of Equity to foreclose his mortgage as against the holder of the title, without offering to pay the remainder of the purchase money.

In Equity, in Dougherty Superior Court. Decision by Judge ALLEN, at the June Term, 1859.

The Mechanics' & Savings Bank filed a bill against George W. Crummev and Lindsey H. Durham, which makes the following allegations:

That on the 13th day of June, 1857, Crummev made a promissory note for \$2,200, due at four months, and payable to H. H. Hubbard, or bearer, and on the same day executed a mortgage to secure said note, on a certain lot of land in Albany; that before said note matured, complainant purchased the same, together with said mortgage, for a valuable consideration, from said Hubbard, and that the note is due and unpaid; that subsequent to the date of said mortgage, several judgments were obtained against Crummev, one of them being in favor of James C. Selman & Co., and rendered by the 6th Circuit Court of the United States for the Southern district of Georgia; that a *fi. fa.* issuing from the judgment mentioned was levied on said lot, and it was sold by the Marshal on the first Tuesday of March, 1858, subject to the incumbrance of complainant's mortgage, public notice having been given of said mortgage, both in the Marshal's advertisement and by announcement from the stand at the time of sale; that Lindsey H. Durham having bid seven dollars for said lot, "over and above said incumbrance," the same was knocked off to him; that since said sale, complainant has been informed, and believes, that Crummev bought said lot from William W. Cheever, agreeing to pay Cheever therefor \$1,000; that \$600 of said amount was paid by Crummev, and Cheever made him a bond for title, in which he stipulated to make Crummev a good title when the remaining \$400 should be paid, and that the said \$400 was not paid when said mortgage was executed; that after said sale

Crummey et al. vs. The Mechanics' & Savings Bank.

mev and Durham combined to defraud complainant and t said mortgage lien, Crummey assigning said bond for to Durham, and Durham satisfying the debt to Cheever asking Cheever's deed to the whole lot; that said lot ie improvements on it are worth largely' more than all ns outstanding against them, the oldest lien being com- nt's mortgage.

bill prays a foreclosure of said mortgage, and that the sold for the purpose of paying said note.

defendants demurred to the bill on the following ls:

That there is no Equity in the bill.

Because if complainant has any rights, the remedy at adequate and full.

Court overruled the demurrer, and counsel for defend- cepted.

. VASON & B. K. HINES, for plaintiffs in error.

. CLARK, *contra*.

ie Court.—STEPHENS, J., delivering the opinion.

mortgage held by the Bank covered Crummey's inter- ie land, and nothing more. His interest was, not a t the right to have a title, on payment of four hun- lars to Cheever, who held the title, or to anybody might get it with notice of Crummey's right. Crum- le was not good, and their mortgage not effective, the payment of the four hundred dollars. We think r clear, therefore, that the Bank cannot have the aid rt of Equity to render the mortgage effective by a re, without paying, or offering to pay, the four hun- ars to the holder of the title. From the failure to h an offer, the bill was defective, and the demurrer nt to have been sustained.

ent reversed.

Waters vs. McNabb et al.

WATERS vs. McNABB et al.

1 A writ of error does not lie from a decision of the Judge of the Superior Court on a question referred to his decision, and which does not come before him in the due course of proceedings at Law.

Habeas Corpus. Tried before Judge ALLEN, 27th June, 1859, from Decatur County.

Upon the petition of Noah McNabb and wife, one of the Justices of the Inferior Court of Decatur county issued a writ of *habeas corpus*, directed to, and commanding Ephraim D. Waters to bring before said Justice the body of Lucian N. Waters, a minor about ten years of age, and a child of Mrs. McNabb, by a former marriage. The petition alleged, and it appeared in evidence, that the child was living with his mother at McNabb's when he was taken away by Ephraim D. Waters, his paternal uncle and guardian.

Without a trial in the inferior Court, the parties consented and agreed to the following order, viz :

"Upon the consent and agreement of counsel here in Court, it is ordered that this case be referred to the decision of the Honorable ALEXANDER A. ALLEN, Judge of the Superior Court of the South-western Circuit, in Bainbridge, on Monday Morning at 10 o'clock, or at such other time as he may appoint, and that the witnesses attend said Court at that time.

(Signed)

"C. J. MUNNERLYN, J. I. C.

"LEN. M. GRIFFIN, J. I. C.

"F. G. ARNETT, J. I. C."

The case coming up before Judge ALLEN, under the foregoing order and consent, on the 27th June, counsel for Waters demurred to the proceeding, upon the grounds—

1st. Because this Court has no jurisdiction in cases of *habeas corpus* at Common Law.

2d. Because the writ is improperly and illegally directed, it being addressed to the Sheriff, when it should have been addressed or directed to the defendant.

3d. Because there is no allegation that Lucian, the minor, is under improper restraint.

th. Because the petition shows that plaintiffs are not the natural guardians of the infant, and have no right, as such, to have custody.

h. Because plaintiffs will be the heirs at Law of said infant, in the event of his death, and therefore not entitled to have custody.

h. Because said minor is over seven years of age.

h. Because plaintiffs have no legal right to the custody of the minor, and to maintain this proceeding.

The Court overruled the demurrer upon all the grounds therein contained, except the second, which the Court allowed counsel for relators to amend, by directing the writ of habeas corpus to the defendant, as well as to the Sheriff.

which decisions counsel for defendant excepted.

Counsel for defendant then moved to dismiss the writ, as granted, on the ground that the same had not been served on the defendant.

The Court refused the motion, and counsel for defendant excepted.

Counsel for defendant then requested the Judge to permit him to withdraw his answer to the writ, upon the ground that the same was made and filed while he was under arrest, and without protest.

The Court refused to allow the answer to be withdrawn from the file, except for the purpose of amendment.

which ruling defendant excepted.

The cause then proceeded, and after hearing testimony on both sides, the Judge ordered and awarded the custody of the minor to the mother, Mary A. McNabb, and her husband, Voah McNabb, the order reciting or stating that said order "appears to this Court, from all the circumstances and facts submitted to the Court, to be most beneficial to the interests of said minor child, Lucian N. It is further ordered that said Ephraim D. Waters pay to the officers of Court the sum of ——— and all other cost of this proceeding."

which order counsel for defendant excepted, and thereupon presented his bill of exceptions, assigning as error the grounds and decisions and judgments as above excepted to.

& SIMS, BOWER, for plaintiff in error.

IV. EVANS, *contra*.

By the Court.—LYON, J., delivering the opinion.

The record shows that the *habeas corpus* was sued out and returnable to the Justices of the Inferior Court of Decatur county for trial, and by law they were the persons to hear and try the same, but by agreement, it was referred or transferred to the decision of Judge ALLEN, Judge of the Superior Court. The question did not properly come before him by operation of Law or by the requirement of the Law. His was not the tribunal appointed by Law to hear and determine the question in that case, but it was returnable to, and triable by, the Inferior Court. Therefore, his decision in the premises was not such a "decision, sentence, judgment or decree" from which a writ of error lies, under the organic law of this Court. A writ of error lies only to such judgments, decisions, sentences or decrees as are made by the Court, as a Court, and which comes before, and is tried by him in the usual course of proceeding, as provided for by Law, and not upon those that, like this, are extra-judicial, and come before, and are decided by him, on the agreement or reference of the parties, no more than if the question had been referred to, or decided by any other person. *Herrington vs. Herrington*, 15 Ga., 361. For these reasons, the writ of error must be dismissed.

GAULDIN vs. CRAWFORD.

1. If a brief of the evidence be agreed upon by the counsel of the parties at the Term when the case was tried, in which it is consented that the original interrogatories and the documentary evidence referred to in the brief, may be used, when the brief of the evidence may be necessary, that is a sufficient compliance with the rule of Court; moreover, the party so consenting cannot take advantage of the failure or omission to incorporate the written testimony into the brief.

If a brief of the testimony be agreed upon by counsel at the Term when the case is tried, that agreement may be entered upon the Minutes at any subsequent time.

be LV and LVII §§ of the Judiciary Act of 1799, as to granting New Trials, expanded.

the practice of withdrawing original papers from the Clerk's office, which, by agreement, constitute a part of the brief of the testimony agreed upon, the purpose of applying for a new trial, condemned.

Courts should so administer the law and construe the rules of practice, to secure a hearing upon the merits, if possible.

motion to dismiss Rule for New Trial, from Decatur County. Decided by Judge ALLEN, October Term, 1859,

action on the case having been brought in favor of John P. Crawford, against John P. Gauldin, resulted in a verdict for the defendant.

The plaintiff then moved a rule for a new trial to be heard at next, viz: the October Term, 1859.

On hearing the rule, counsel for defendant moved to dissolve the same, on the following grounds:

That the rule nisi issued in said case had not been entered on the Minutes of said Court or otherwise authenticated.

That no brief of the evidence used on the trial of said case had been approved by the Court.

The agreement of counsel as to said brief had not been entered on the Minutes of said Court or otherwise authenticated.

That no brief of the evidence used on said trial had been filed in said Court or in the Clerk's office thereof.

That no notice of said application had been served on John P. Crawford or his attorney.

It appears, from the bill of exceptions, that no twenty-four hour notice of the rule was served by the movant on the defendant, but that when the rule nisi was granted, defendant's counsel was present in Court; also, that a paper containing the evidence, and referring to certain records, writings and exhibits therein specified, (and which records, &c., it was agreed should be used as a part of the brief of evidence) had been agreed on and signed by counsel for the plaintiff, but had not been entered on the Minutes of the Court, or otherwise authenticated. It, however, appeared

that counsel for Crawford had handed the paper to the Clerk, who endorsed thereon, "filed in office May 4, 1859," and that afterwards, during the Term, said counsel had taken the same, with the papers referred to, out of the Clerk's office and kept the whole in his possession in Albany until the succeeding Term. It did not appear that this brief of the evidence had been approved by the Court.

After hearing argument, the Court refused to dismiss the rule for a new trial on all the grounds stated.

Whereupon, counsel for defendant excepted, and assigns the same as error.

BOWER, for plaintiff in error.

WARREN & WARREN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Was the Court right in refusing the motion to dismiss the application for a new trial in this case?

The motion was made on various grounds—1st, That the rule had not been served; 2d, That no notice of the application had been served upon Gauldin or his attorney; 3d, That no brief of the evidence had been approved by the Court; 4th, That the agreement of counsel as to the brief of evidence had not been entered upon the Minutes or otherwise authenticated; 5th. That no brief of evidence used on the trial of the case had been filed in the Court or the Clerk's office.

The Court refused the motion, but postponed the hearing to the next Term of the Court.

The facts are these: A brief of the evidence was agreed upon by counsel in these words: "It is agreed that this is a brief of the evidence in this case, and the original interrogatories and the documentary evidence referred to in the brief, may be used whenever the brief of the evidence may be necessary."

Counsel for Gauldin have, by their agreement, excluded themselves from excepting to the manner in which the brief was made up, viz: by reference to depositions and papers not incorporated in the brief or attached to it. They have

consented that a reference to these papers shall not only be sufficient, but that the originals may be used whenever it shall become necessary. It is literally true, too, that the brief so made out and agreed upon was filed in the Clerk's office. The Clerk so certifies, and such is the fact. The complaint is, really, that so soon as this indorsement was made by the Clerk, the counsel for Crawford withdrew the papers from the Clerk's office, and that they had remained ever since in his possession, until the case was taken up to be argued.

Whatever may be the motive, this practice is wrong, and should not be allowed by the Courts. The original papers, made a part of the brief, should remain in the office, unless taken out temporarily or by the consent of the opposite party, or else copies should be procured. If there be any urgent necessity for withdrawing the originals, instead of leaving them in the office, which the parties were bound to do, let them insert copies in the brief.

It is true, that the agreement of counsel was not entered upon the Minutes. Does this justify a dismissal of the rule? This is not like the case cited from the Reports, where the Judge had to rely on his memory at a subsequent Term. Here, while the testimony was fresh in the recollection of the parties, they agree upon it and sign the agreement. Is anything more needed to secure the correctness and integrity of the proof? An order might be passed at any time directing this agreement to be entered upon the Minutes. Neither Courts nor governments, nor an other organization, civil or ecclesiastical, can challenge the respect of mankind by anything at this day, which is not founded in reason.

What are the facts, and what is the law of this case, upon the subject of notice?

The Statute directs that twenty days notice shall be given by the party applying for a new trial, to the adverse party, of his intention to apply, and the grounds of his application. (Jobb, 508.) The Act does not apply, of course, to a motion for a rule nisi made at the same Term when the trial was had; for that would be to require an impossibility.

A rule nisi may be moved for without previous notice. The Statute has reference to the Term when a rule absolute is asked, or to the Term when the rule nisi is asked to be made absolute. The Law is founded upon the idea, that the rule

Gauldin vs. Crawford.

nisi will be applied for at the first Term, and notice given to the adverse party twenty days before the next Term. And if there be any departure from this mode of procedure, it must be by consent, and under the peculiar circumstances of the case.

Here the rule *nisi* was moved for at the first Term. It stood for a hearing under the Act at the next Term, there being no understanding to the contrary. The counsel for Crawford states that the counsel for Gauldin was in Court when the application was made. However true that may be, we place no reliance upon it. But the counsel for Gauldin did at that Term agree upon a brief of the evidence, and that the same might be used whenever it was necessary. And for what purpose was this brief of the evidence agreed upon? The Law knows of but one purpose, and that was to be used upon the argument of the motion for a new trial in the case. Indeed, he does expressly consent, in writing, that it may be so used.

An is not this tantamount to notice?

Well, when the case is called six months afterwards, there is a further postponement of the cause, in order to silence any complaint on the ground of surprise.

Rather than that Justice should be defeated—by which I mean a failure to hear the motion for the new trial on its merits—I am not prepared to say that the Courts ought not to grant time to serve the notice. Parties are too often prejudiced by an assumption which we know full well has no foundation in fact—*want of notice*. If they will insist on the letter of the Law—the pound of flesh—they must not complain if the Courts, to prevent injustice, are driven to the necessity of postponing the cause, in order that they may get the benefit of their extreme rights.

So exacting have the public become, that, contrary to all reason, and a proper regard for the rightful distribution of power between the different Departments of the Government, that they hold the Courts responsible for administering bad law, instead of the Legislature for making it or suffering it to remain on the Statute Book.

We must endeavor, then, so far as we can, without overstepping the limits of judicial power, so to construe the Law and rules of practice as that a judgment upon the merits shall not be defeated upon a hypothesis which has no reality.

Sanders vs. The Town Commissioners of Butler.

To be deprived of life, liberty or property, without an opportunity of being heard, is the extreme of tyranny. But while this rarely ever occurs, in point of fact, how much more common is it for Justice to be defeated by feigning ignorance, because the forms of Law have not been complied with, or strictly pursued in giving notice of legal proceedings?

SANDERS vs. THE TOWN COMMISSIONERS OF BUTLER.

1. The Act of 1809, "to regulate the rates of Tavern Licenses in this State," has relation only to the prices of licenses, and leaves the power of granting licenses just where it had before been placed, or might thereafter be placed, by Law.
2. The Courts will not infer that the Legislature intends to authorize a local departure from a general policy of the State, unless the local exception is expressed in specific terms.

Certiorari, in Taylor Superior Court. Decided by Judge WORRILL, at October Term, 1859.

Sanders was brought before the Commissioners of the town of Butler on the charge of retailing spirituous liquors in said town without having obtained a license from said Commissioners in violation of an ordinance passed by them. After hearing evidence, the Commissioners fined him \$60. He excepted to the judgment and sued out a certiorari, in which he alleges that neither the Act incorporating the town of Butler, nor any other Act of the Legislature, gave said Commissioners power to regulate the retail of spirituous liquors in said town, and that the Ordinance, therefore, passed on the subject by them is void. The answer of the Commissioners admitted that they had assessed the fine as stated, and

Sanders vs. The Town Commissioners of Butler.

contended that their Ordinance was authorized by the town charter, and valid.

The Court below sustained the validity of the Ordinance and affirmed the judgment of the Commissioners, and counsel for Sanders now assign that decision as error.

JAMES T. MAY, for plaintiff in error.

W. S. WALLACE and W. P. EDWARDS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. Sanders had a retail license from the Inferior Court, but the town Commissioners fined him for retailing without a license from *them*. The case presents a conflict between the Inferior Court and the town of Butler, as to which of the two has the legal power of granting licenses to retail within the town. The power is claimed for the town—first, under the Act of 1809, *Cobb's Dig.*, 1038, which, it is argued, confers the power upon *all* incorporated towns. That part of the Act which is claimed as having this effect, is a mere proviso to the first section. That section fixes the price of a license at five dollars, and then the proviso to it declares that nothing in the Act “shall be construed to control the rates which now are, or may be, established by the corporations of Savannah and Augusta, or any other incorporated town in this State.” This Act, including the proviso, has relation, not to the power of granting licenses, but only to the rates or *prices* of licenses. Before the passage of this Act, the general law for the State was, that licenses were to be granted by the Inferior Courts of their respective counties, *without price*; while the local law for Savannah and Augusta, and perhaps for some other incorporated towns, was, that licenses were to be granted by those towns for their own localities, at *such prices* as each one might fix for itself. Then came the Act of 1809, providing a general *price* for licenses, and (lest that general price might be construed into a universal one,) guarding against that consequence by leaving untouched those local prices which had been already established, not by “any incorporated town which might have *usurped*, or might thereafter *usurp*, the

Sanders vs. The Town Commissioners of Butler.

power to establish prices, but by "any incorporated town" which had been or might be authorized to establish such prices—the whole scope of the Act being to provide a general rule for prices, without interfering with the system of local town rates, so far as that system had been, or might be, established by law. Such is the clear spirit and intent of the Act. But even the letter of it utterly fails to justify the conclusion which is sought to be drawn from it, that it invests "any incorporated town" with the power of granting licenses. The utmost inference justified by even its letter is, that it conferred upon "any incorporated town;" that is to say, upon *every* incorporated town, the power to regulate the prices of licenses, without the slightest change in the sources from which licenses must emanate. The power to regulate the prices of licenses is one thing, and the power to grant licenses is another thing; and the one cannot be claimed as a necessary incident to the other, and especially the greater power of granting the license cannot be involed as an incident to the lesser one of regulating its price. There is no necessity that the two should go together, and this very Act separates them in the general rule for the State, the Legislature itself fixing the price, and leaving the Inferior Court to grant the license. There are several subsequent legislative interpretations of this Act in conformity with the construction we have given it. First, there are divers subsequent charters conferring the power to grant licenses upon particular incorporated towns, clearly implying that there was no general law conferring it upon *all* incorporated towns. Next, there is the Penal Code of 1833 punishing retailing without a license from the Inferior Court, "*except* in corporate towns or cities, where, by Law, authority to grant licenses is vested in the corporate authorities of *such* towns or cities." The language of this exception is not "except in corporate towns and cities," leaving the exception to extend to *all* corporate towns and cities, but the exception is confined to *such* corporate towns and cities where, by Law, the authority to grant licenses is vested, clearly implying that there are *other* corporate towns and cities where the authority is *not* vested. This same form of expression is preserved, and the same inference is to be drawn from it in the Act of 1854, modifying the terms of the Penal Code of 1833. So much for the construction of the Act of 1809. But if our construction is

Max, Schultz et al. vs. Watkins et al.

wrong, and the Act was intended to confer the power of granting licenses upon all incorporated towns, then so much of it as expresses that intention is void by the Constitution, because it is a clear departure from the title of the Act, its title being simply "An Act to regulate the rates of Town licenses in this State." It is not an Act to regulate licenses generally, including all things pertaining to them, but to regulate only one thing pertaining to them, and that is their prices. Anything in the body of the Act conferring a power to grant licenses, is "matter different from what is expressed in the title thereof," and is therefore void by the Constitution.

2. The power to grant licenses is claimed for the town, in the next and last place, from its charter. It is claimed, not under any clause conferring it in terms, but under a clause which confers upon the town a power of general legislation for itself. This power of legislation must be exercised in subordination to the Constitution and general laws of the State. We will not infer that the Legislature intends to authorize any local departure from a general policy of the State, unless the local exception is expressed in specific terms.

Judgment reversed.

MAX, SHULTZ et al. vs. WATKINS et al.

When goods are attached and claimed, and the proof submitted by plaintiff at the trial of the issue, is slight as to title, evidence that the goods, at the time of the levy, were in the possession of claimant, and not of defendant, is proper to be considered by the Jury on the question of title.

Claim Issue, in Dougherty Superior Court. Tried before Judge ALLEN, at June Term, 1880.

Max, Shultz & Co. vs. Watkins & Co.

atkins & Cobb sued out an attachment against Leopold Anslucker, and caused the same to be levied on a certain stock of goods in the town of Albany; to which a claim was interposed by Max, Shultz & Co.

At the trial, it was proved by plaintiff in attachment, that at the time of the levy, defendant was not in Albany, and had been absent from one to three weeks; that prior to the levy, defendant had occupied a store-room and had a sign over the door with his name on it. A witness stated that he had known Anslucker and one other Dutchman in the store, and had bought goods of both. At the time of the levy, a Dutchman was in possession of the store-room, but did not know whether he was a partner or a clerk; thought he was a clerk; and just before the levy, all the goods were sent to the railroad depot in Albany. The goods were packed in boxes, and were taken to some parties in New York.

The plaintiffs here rested their case.

Defendant then offered to introduce the evidence of S. Arnsperfer, taken by commission, which is, in substance, as follows:

"The goods in question were, at the time of the levy, in the possession of Max Smith, (or Shultz?); witness was acting as agent for the claimants; Anslucker had no interest in the goods at the time of the levy, so far as witness knew; he had no interest in the goods for two days prior to the levy, from what witness knew; witness had possession of the goods, and considered them as the property of claimants and S. Housley. The goods were all packed and boxed for shipping, and were taken to 'Max, Shultz & Co., New York,' to whom they were to be shipped; it was two days prior to the levy witness knew that Anslucker had no interest; the sale and transfer of the goods was made before; witness was under orders by letter from the parties, and packed up the goods under orders from them, and sent them to the depot; witness understood the orders which he received from Anslucker, and from Max, Shultz & Co., that Anslucker had no interest in the goods, and cannot find the letters.

The court, on motion of plaintiffs' counsel, rejected this evidence on the ground that the witness' information was derived from the parties themselves, and claimants excepted. Found for the plaintiffs.

Max, Schults et al. vs. Watkins et al.

STRAZIER & SMITH, for plaintiff in error.

No appearance for defendants.

By the Court.—LYON, J., delivering the opinion.

The proof submitted by the plaintiff on the trial to show title in the defendant in attachment to the goods levied, was very slight. It amounted, at most, to the establishment of a mere presumption that the goods were in possession, or had been in possession of the defendant, from which title might be inferred. The testimony of the witness Sigismund Ardeledoffer, offered by the claimant, and ruled out by the Court, was admissible, and proper to be considered by the Jury for the purpose of rebutting such presumption. Whether it would do so, was a question for the Jury. It certainly does show that the witness had possession of the goods for the claimants, and not the defendants, at the time of the levy. Whether the holding was good against the creditors of Anslocker, is another question, and that, too, is for the Jury. We held that the evidence ought not to have been excluded from the Jury.

Judgment reversed.

Water Lot Company vs. The Bank of Brunswick.

WATER LOT COMPANY vs. BANK OF BRUNSWICK.

The Sheriff made the following return upon the declaration :

"Served a copy of the within writ by leaving the same at the most notorious place of abode of Walter T. Colquitt, the President of the Water Lot Company." *Held*, That it was a good service upon the Company.

Rule *Nisi* to set aside Judgment, from Muscogee County. Decision by Judge WORRILL, May Term, 1859.

The plaintiff in error moved a rule *nisi*, calling upon the Bank of Brunswick to show cause why two certain judgments embraced in the rule should not be set aside for want of jurisdiction in the Court rendering the same.

Alfred H. Colquitt, as assignee of said judgments, answered the rule, and stated that he was the owner of said judgments by assignment for value, and that the service of the process upon the defendant by the Sheriff was a sufficient service to give jurisdiction to the Court rendering said judgments.

The return of the Sheriff on the two declarations was as follows :

"Served a copy of the within writ and process by leaving the same at the most notorious place of abode of Walter T. Colquitt, the President of the Water Lot Company."

The motion to set aside said judgment was founded on the alleged defect in the above service as made and returned by the Sheriff.

Colquitt, assignee, asked permission of the Court, on the hearing, to allow the Sheriff to amend this return, according to the facts, by inserting the word "residence," in place of the word "abode." Which was objected to by the movant. The request was granted, and the amendment made accordingly.

Counsel for the movant excepted thereto.

After argument in the cause, the Court refused to make said rule absolute, and ordered the same to be dismissed.

Counsel for movant excepted thereto, and assigned the same as error.

DUNTON, for plaintiff in error.

 Kitchand et al. vs. Davis.

MOSES, for defendant.

By the Court.—LUMPKIN, J., delivering the opinion.

There is but a single point in this case, and that is, Whether service upon the head of a corporation, by leaving a copy of the writ at his notorious place of abode, is sufficient!

At Common Law, all service had to be personal. The Act of 1799 authorizes service to be made by leaving a copy at the notorious place of residence of the defendant. By our Statutes, notorious place of *residence* and notorious place of *abode* are legal synonyms. *Cobb*, 471, 528, 530.

The Act of 1845, *Cobb*, § 80, comes in aid of the Common Law and of the Judiciary Act of 1799, as to the manner of serving the heads of corporations, by leaving a copy at the most public place or office of transacting the business of the corporation. We think the service in this case was good without amendment.

KITCHAND *et al.* vs. DAVIS.

Where the judgment which is sought to be reversed, gives the plaintiff an error all that he claims, it will be affirmed, without regard to any errors he may have been committed on the trial.

In Equity, in Dougherty Superior Court. Tried before Judge ALLEN, at June Term, 1859.

This was a bill filed by John Davis against William I. Kitchand, N. Collier, Collier & Beers, Hunt, Pyncheon Rawson and others, which makes the following allegations: That complainant, on the 31st day of December, 1850, leased his plantation in Baker county to said Kitchand, and of

Kitchand et al. vs. Davis.

teen negroes, for the term of three years. Kitchand agreeing to pay \$2,000 for the year 1851, \$2,500 for the year 1852, and \$2,500 for the year 1853, the rent to be paid at the end of each year respectively; that in said lease the crop, as well as all negroes owned by Kitchand, were "pledged as a lien" for the rent and hire, and that the crop should not be sold unless the rent was otherwise paid, except for the purpose of paying it; that said lease bound Kitchand to clothe the negroes, and at the expiration of the term, to leave on said plantation the same amount of corn and fodder, and the same number of horses, hogs and cattle as were on the place at the commencement of the lease; that Kitchand took possession of the property leased, and has used and enjoyed the same up to the filing of the bill, making large crops of cotton, corn and other produce; that without paying the rent for the year 1851—all of which is still due; Kitchand has disposed of the crop of that year, and appropriated the proceeds to the payment of other debts, the purchase of property, &c.; that the crop of the year 1852 (the year when the bill was filed) is large, and consists of cotton, corn, &c., and is fully adequate to pay the rent to become due for that year; that Kitchand is insolvent, and refuses to turn over the crop gathered for the year 1852 in payment of the rent agreed on for that year; that Kitchand, being indebted by open account to Collier & Beers, and Hunt, Pyncheon & Rawson, with a view to give an undue preference to them, and postpone complainant, closed up their accounts by giving notes falling within Justices' Court jurisdiction, and said notes have been sued to judgment, the aggregate amount of the judgments in favor of Collier & Beers, being \$317 30, besides interest, and the aggregate of the amount of the judgments obtained by Hunt, Pyncheon & Rawson being \$338 21, besides interest; that *fi. fas.* have been issued and levied on the crops aforesaid; that a *fi. fa.* in favor of Seth C. Stephens against said Kitchand has also been levied on said crop, said *fi. fa.* being for \$150, and N. Collier being the assignee; that complainant believes the holder of said *fi. fas.* had notice of his lien before mentioned; that complainant also had a distress warrant levied to recover the rent due for the year 1851, and an agreement between all the said parties—Kitchand consenting—had been made, by which the sheriff was authorized to sell the property levied on and held.

Kitchand et al. vs. Davis.

the proceeds until the rights of the claimants of the fund were adjudicated.

The bill prays that said *fi. fas.* be enjoined and postponed until the claim of complainant is paid, and asks that the proceeds of the crops aforesaid, and of any property previously purchased by Kitchand therewith, shall be applied to the payment of complainant's demands for rent.

Complainant, by amendment, charged Kitchand with selling stock, farming utensils, &c., and also collecting money belonging to him and buying horses, mules, &c., and otherwise appropriating the proceeds to his (Kitchand's) use.

The parties defendant claiming the fund raised by the Sheriff under the agreement mentioned, filed their answer, in which they take issue with complainant on several of the allegations of his bill—amongst others, as to the legal effect of the provisions of said lease.

On the trial of the case, there was a great deal of evidence introduced, and the Jury rendered a verdict decreeing that \$2,782 65 of the fund in the Sheriff's hands should be paid over to complainant, and the balance be applied to the payment of the judgment creditors of Kitchand.

Counsel for defendants moved for a new trial on the following grounds:

1st. Because the Court erred in charging the Jury that the lease or articles of agreement between complainant and Kitchand did not convey an absolute title to the property specified in said instrument, other than the land negroes, to-wit: horses, stock, corn, fodder, &c., to Kitchand, but only a qualified property; that it simply gave the care of the same to Kitchand, while actual ownership remained in Davis, and that they should deduct from the proceeds of the sale the actual value of such property—if there was any proof of its actual value—at the time it was received by Kitchand; and if there was no proof of its actual value, then they might arrive at its value by estimating the same at what similar property brought at the sale.

2d. Because the Court erred in charging the Jury that they should deduct from the amount of sales whatever said property brought at said sale as had been purchased by Kitchand with money arising from the sale of crops grown on the place, or money that Kitchand had received from the sale of such crops and find for complainant such sum or sum

Kitchand et al. vs. Davis.

1. Because the verdict is contrary to that portion of the
t's charge in which he told the Jury to apply the pro
of all property sold at said sale, other than what is
aced in the charges above mentioned, to the payment of
judgment creditors of Kitchand, excepting only such
erty as it affirmatively appeared was purchased by Kitch-
with Davis' money, or with the proceeds of crops on
Davis had a special lien.

. Because the verdict is against Law and the evidence.
Court refused to grant a new trial, and defendants
ted.

view taken of this case by the Supreme Court renders
ecessary to make any further statement of the brief of
ce than this: That the fund in the hands of the Sheriff
s from the record to be sufficient to satisfy and pay off
ims of the defendants—who moved for a new trial in
urt below—after deducting the amount which the Jury
l should be paid to the complainant Davis.

ER; WARREN & VASON, for plaintiffs in error.

ZIER & SLAUGHTER, *contra*.

the Court.—STEPHENS, J., delivering the opinion.

Record shows that the judgment which is sought to be
, will, if executed, satisfy the utmost demand of the
in error, and they, therefore, have no right to com-
it. We will not consider the errors assigned, for it
that whatever errors may have been committed, they
e no harm to the only persons who are complaining
One side is satisfied, and the other *ought* to be.

ent affirmed.

RAIGUEL vs. DESSURE.

There should be very strong evidence to overcome the plea of payment, supported by the plaintiff's receipt in full of all notes and accounts, to its date, which is subsequent to the note sued on.

Tried before Hon. EDMOND H. WORRILL, in Muscogee Superior Court. May Term, 1859.

There was but one question in this case, and the facts are sufficiently stated in the opinion of Judge LUMPKIN.

R. W. DENTON, for plaintiff in error.

WILEY WILLIAMS, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

The action in this case was brought on a note given by the defendant to the plaintiff for \$222 19, dated 4th of July, 1853.

The defendant pleads payment, and relies on a receipt given by the plaintiff to the defendant on the 10th of August, 1853, in full, of all notes and accounts up to that date. Plaintiff offers some proof to show that this note was not included in the settlement. The Jury were of the opinion that it was not strong enough to overcome the receipt, and we think they were warranted in so finding. At least, it cannot be said that the testimony was strongly and decidedly against the weight of the evidence.

ENNIS et al. vs. WILLIAMS et al.

Notice of the dissolution of the partnership must be given to those who have dealt with the firm, or each member of the firm will be bound by the acts of the other dealing in the name of the firm with such persons, especially when the transaction relates to the past debt of the dissolved partnership.

Motion for New Trial, from Chattahoochee Superior Court, Tried before Judge PERKINS, at November Term, 1859.

The facts of this case are fully stated in the opinion of the Court.

L. T. DOWNING, for plaintiffs in error.

JOHNSON & SLOAN, for defendants in error.

By the Court.—LYON, J., delivering the opinion.

The plaintiffs instituted an action of debt in the Superior Court of Chattahoochee county, against the defendants, as attorneys, and partners, under the name of Williams & Oliver, to recover the sum of four hundred and twenty-eight dollars and eleven cents on a note dated at Columbus, Ga., on 2d January, 1854, made and delivered to plaintiff, payable one day after date, to the plaintiffs for that sum. The declaration also contained a special count for goods, wares, &c., sold and delivered to certain persons at Buena Vista engaged in the business of carriage making, in partnership, under the name of Webb, Ford & Co., upon a letter of credit given by defendants and the goods, consequently, charged to defendant.

To this action defendant, Williams, filed a special plea of *non est factum*, alleging that at the time the note sued on was given, the firm of Williams & Oliver was dissolved, if it ever existed, and that said firm name was signed to said note by Oliver, without the knowledge or consent of defendant, and taken by the plaintiffs with a full knowledge of the fact. Further, that at the date of the note there was no such partnership, and that the partnership that did exist between defendants was one solely for the practice of law; and further, that it was not the act or deed of him, said defendant.

Ennis et al. vs. Williams et al.

On the trial, the plaintiff proved by one Douglass, (to whom the bill of particulars set out in plaintiff's declaration, amounting, in the whole, to \$661 86, was exhibited,) that he sold and delivered the goods at the prices stated to Ford, on an order from Williams & Oliver, to let Ford have what he might wish to purchase to carry on his carriage business, which order, with a letter from Williams—both signed by defendant, Williams—were attached to the answers of the witness. The goods were sold on the 26th and 27th January, 1853, on the occasion of Ford's visit to Columbus, mentioned in the order. The goods were sold and delivered entirely on the credit of the order. This witness was at the time a clerk and book-keeper for the plaintiffs. Witness had a conversation with the defendant, Williams, while the suit was pending in Russel county, Alabama. Williams told witness that he would throw him in that suit. Witness replied, that then the suit would be brought on the account. Williams said, in that case, the plaintiff could only recover the amount of goods purchased by Ford, on his first visit to Columbus. Witness told him that all the goods were purchased at the first visit. Does not recollect when he and plaintiffs first heard of the dissolution of the firm of Williams & Oliver. The plaintiffs had frequently employed defendants as attorneys at law to collect claims for them.

The plaintiffs then introduced the following order and letter, to-wit:

BUENA VISTA, January 25, 1853.

"MESSRS. J. ENNIS & Co.—

"*Gents*: Please let Mr. Ford have what he may wish to purchase, to carry on his carriage business, for which, hold us responsible. Our responsibility, however, is to extend only to purchases made during his present visit to your place.

Yours, &c.,

"WILLIAMS & OLIVER,
"per WILLIAM F. WILLIAMS."

"OPELIKA, ALA., August 25, 1857.

"MESSRS. J. ENNIS & Co.:

"I learn by a letter from Mr. L. T. Downing you have lodged the note of Williams & Oliver in his hands for collec-

Konia et al. vs. Williams et al.

If you think you can get any money out of me by suing such a course, you can "fire away." That's all I can play at.

"WM. F. WILLIAMS."

The witness Douglass, in reply to cross-interrogatories, that defendants were parties in the practice of Law; not know how long they remained in partnership, or they ever were in partnership in any business except law; the goods were all sold to Ford on the order of Williams & Oliver, signed by Williams; none of the goods sold to either Williams or Oliver personally; the goods charged on the books of plaintiff, in the first place, to Williams and Oliver; \$232 75 has been paid on the account, books closed by note given by Oliver for Williams & Oliver; on 25th May, 1854; note was given then, but dated no time when the account was due, as is usual; the note was given to close the books for the balance due on account, and by Oliver, who signed the firm name.

Ellis, the proprietor of the Columbus Times, testified that the Law card of defendants, as partners, was published in his paper from 27th February, 1852, to 28th January, 1853, and discontinued; A Law card of Williams, Oliver & Brown, as partners, was inserted in his paper on 28th May, 1853, and discontinued about 1st December, 1853; plaintiffs reside and do business in Columbus, and have last ten or fifteen years; they were subscribers to his paper while the advertisements were running, and regularly published the paper; by the omission of the printer, the card of Williams & Oliver was not taken out when that of Williams, Oliver & Brown was first inserted, although it was so.

but continued to run for a little while, and was then discontinued; the note set out in plaintiff's declaration was read.

A. Blandford testified: That the partnership of Williams, Oliver & Brown was formed some time in 1852, in Buena Vista, Georgia county, for the practice of Law, which continued, in the early part of 1853, when that partnership was dissolved and a new one was formed of Williams, Brown & Oliver; the last one continued until the last of December, 1853, when it was dissolved; Brown went to Talbotton, and Williams remained in Columbus.

Annis et al. vs. Williams et al.

Wiley Williams testified: That defendant, Williams, was an unmarried man; came to Columbus to live about first of November, 1853; about the first of the year 1854 he furnished himself a room across the street from the plaintiff's place of business, and lived in Columbus during that year. The defendant, Williams, also put in proof an account made by him-self with the plaintiff during the year 1854, of little articles such as a single man would likely have about his room, such as brushes, brooms, tubs, buckets, &c.

The Jury returned a verdict for the plaintiff, against both defendants and defendant, Williams, moved for a new trial on four different grounds: That the verdict was against law, evidence, the charge of the Court, and because the Court erred in its charge to the Jury.

The Court granted a new trial generally, without stating on what ground the new trial was allowed.

To which decision the plaintiff excepted, and that is the question for our consideration.

Was the Court right in granting the new trial?

It is altogether unnecessary to notice any of the grounds of the motion for new trial, for the whole question in the case is whether the giving the note of the firm, by Oliver, one of the parties, after the alleged dissolution of the partnership, discharged the defendant, Williams, from liability on this debt? For it will not be denied but that he is liable, unless he was discharged by that fact.

This Court decided in *Stone vs. Chamberlin & Bancroft*, 20 Gr., 259, "that if the creditor, knowing the dissolution, takes a new note from one member of a firm, so dissolved in renewal of an old note of the firm, that fact will discharge the other members of the firm, who were not present or assenting thereto, although the firm name was signed thereto. On the authority of this case, the defence in this case rested. To that everything tended.

This case, fortunately for the plaintiffs, lacks a very important and necessary ingredient of that of *Stone vs. Chamberlin & Bancroft*—that of a knowledge of the dissolution of the partnership of Williams & Oliver, by the plaintiff, at the time their note sued on was given in liquidation of the open account. It is not enough to say that the plaintiffs might have known it from the fact of the advertisement of the new card of Williams & Oliver being discontinued, or the forma-

Ennis et al. vs. Williams et al.

of a new firm of Williams, Oliver & Brown, or that Williams had left Buena Vista and settled in Columbus. The partnership might have continued, notwithstanding. There was no affirmative proof that the partnership was dissolved when the plaintiff took this note with actual knowledge of that fact.

There is no proof of any such fact in the record. There was proof that the Law partnership of Williams & Oliver was dissolved, but there was no proof—not the slightest—that the plaintiffs knew even that. *3d Kent's Com.*, 7; *Collier on Part.*, § 114, n. § 120, 580; *Ketchum & Co. vs. Clark*, 1 T. R., 144; *Lucas vs. Bk. Darien*, 2 Ala., 280. Notice of a dissolution as to persons who dealt with the firm, must be actual, or something that is equivalent thereto. In this case, even the Law partnership of Williams and Oliver never was advertised. But what had the new partnership of Williams & Oliver to do with this transaction? It was not in the scope of their partnership, nor were they partners. Without the clear recognition of each partner, the one not participating in the creation of this liability would not have been liable. Williams created the liability, and Oliver ratified it as their joint debt by giving the note. This charged both with the debt. As to this transaction, these defendants must be viewed as partners, independent of their Law partnership. Viewed in that light, what was there of a dissolution—of a discontinuance of the partnership? Each to bind the other in respect to this particular transaction? None whatever. The verdict of the Jury was erroneous, and the judgment granting a new trial was erroneous, and that judgment must be reversed, and the new trial re-

WOMACK et al. vs. WHITE et al.

1. E. D., a feme covert, who was entitled to a life-estate in certain negroes, the remainder to her children at her death, filed a bill against the trustee for account of hire and profits, and for his removal and the appointment of a new trustee, in which a decree was rendered. Four years afterwards, in the Court in which the decree was rendered, on the motion of the solicitors for E. D., in that proceeding, passed an order to amend that decree, so far as to direct the Sheriff to sell one of the trust negroes for payment of fees for services in that suit. Upon suit brought by the children of E. D., after her death, against one holding under a sale made in pursuance of that order: *Held*, That such order so passed was void as against the plaintiffs, they not being parties to the same, having no notice thereof, and not represented either on the hearing when the order was passed, or the original bill to which it was amendatory.
2. That a copy of the advertisement taken from the paper in which the sale was advertised, sworn to be such by the Sheriff, who sold under that order, was admissible as evidence.
3. That the purchaser at such sale got no title thereby as against these plaintiffs, and those holding under them are in no better situation, whether they bought with or without notice.

Trover, in Sumter Superior Court. Tried before Judge PERKINS, at April Term, 1860.

The children of Elizabeth Dinkins sued Joseph White and John S. Moore to recover a negro boy named Levi. On the trial, the plaintiffs introduced a deed from William P. Brown, the father of Mrs. Dinkins, dated May 8th, 1827, conveying seven negroes and their increase to one Mark M. Brown, to be held by him in trust for the separate use of Mrs. Dinkins during her life, and after her death, to be divided amongst her children.

The plaintiffs further proved that the negro sued for was a child of one of the negroes mentioned in said trust deed: that Mrs. Dinkins died in 1852, leaving them as her only children, and that demand had been made on the defendants for the negro in dispute, they having him in possession.

They also proved that Horace Dinkins, husband of said Elizabeth, was appointed her trustee in lieu of the said Mark M. Brown, in 1844. They then proved the value of the negro, and his worth for hire, and rested their case.

Womack et al. vs. White et al.

Defendants introduced in evidence the record of a bill filed in May, 1839, in favor of Horace Dinkins, as next friend of his wife, against the said Mark M. Brown, her trustee under deed, alleging his mismanagement of said trust property and his refusal to account with Mrs. Dinkins for the hire of same, and praying that he be removed from his trusteeship, and that he account, &c. Also, the decree rendered on said bill, in which the Jury found that the said Mark M. Brown had fully accounted, but decreed by consent of said parties that he should be removed from said trusteeship, and Thomas Bivins be appointed in his place. This decree was rendered in March, 1840.

Defendants then proposed to read in evidence an order made by the Superior Court of Sumter county, at the May Term, 1844, amending the decree rendered on said bill so as to authorize and require the Sheriff to sell a negro boy, Levi, named in said decree, after advertising sixty days, for the purpose of paying E. R. Brown and Warren and Crawford, creditors of complainant in said bill, the fees which said complainant had agreed to pay them for filing and attending same.

Plaintiffs objected to this evidence, on the ground that the Court granting said order had no jurisdiction, and that the order was a nullity.

The objection was overruled, and the order was read.

Defendant then proved by Green M. Wheeler, that the boy Levi was sold at Sheriff's sale on the 1st of February, 1845, and bid off by Lot Warren at about \$100. Wheeler also stated that Dinkins and his wife lived in a poor house, and not as well provided for as persons having a life-estate in fourteen negroes ought to have

been. The order of sale from Lott Warren to Dudley & Sneed for the same property in dispute was then read, dated March 19, 1845, and was found in conformity with the bill and decree.

M. D. King proved that James White bought the property from Dudley & Sneed in the year 1845, and that they were the heirs of said White, Joseph White being the executor. He heard Joseph White say he had run off the property in 1853 to get him out of the difficulty.

Brady testified, that Mrs. Dinkins was poorly provided for in 1839; that she and her husband and children

removed from Sumter to Marion county in 1839, or early in 1840, and none of them resided in Sumter county in any part of the year 1844.

John J. Hudson stated that he was the foreman of the Jury which rendered the decree in 1840. It was a consent decree. Brown was not present, nor the plaintiffs nor any guardian of theirs, nor were Mr. and Mrs. Dinkins present. Here the defendants rested their case.

Plaintiff introduced one Miller, who testified, that he heard Joseph White say, after this suit was brought, (Thomas Bivins and Horace Dinkins being present,) that when the negro was sold to them, the understanding was, that he was to be carried out of the county, as the title was not good.

Horace Dinkins testified, that he had no notice or information about the sale of the boy Levi until the evening before the sale; that he attended the sale and forbade its taking place, but the Sheriff paid no regard to him; that when the bill was filed against Mark M. Brown, Warren & Crawford and E. R. Brown agreed with witness and wife to attend to said case for \$200 each, taking their joint notes for the same. After the decree in 1840, E. R. Brown came in witness' absence and got the negro Levi from witness' wife. A few days thereafter, witness saw Brown, and it was then agreed between them that Brown was to hire out said negro until said fee notes were paid. Brown kept the negro from thence up to the sale in 1844; he, witness, had hired the negro previously at \$60 a-year; he got the mother of Levi soon after his marriage in 1820, but did not consider her his until 1826; he knew of the deed of trust; was present when it was executed, and paid Judge Tracy for drawing it; he filed the bill for his wife voluntarily, and now, in open Court, disclaims all title to said negro Levi.

Plaintiffs also proved by said Dinkins and Patrick Brady that Dinkins lived as well in 1839 as other people in his circumstances.

Green M. Wheeler testified, that he kept a file of the newspaper in which the sale of the negro was advertised, but the same has been destroyed; that before its destruction, A. J. Warmock, one of the plaintiffs, copied said advertisement in witness' presence from said newspaper, witness reading out, and Warmock writing off the same; a copy advertisement was here shown to witness, being the one prepared as stated, and witness said it was a true copy.

Womack et al. vs. White et al.

Plaintiffs then proposed to read said copy advertisement in evidence. Objection being made, the Court rejected it, and plaintiffs excepted.

Plaintiffs' counsel then stated that they were surprised, and asked the Court to continue the case to enable them to procure a copy of the newspaper containing the advertisement.

The Court refused to continue the case; and the evidence having closed, the Jury returned a verdict for defendants.

Before the Jury retired, the Court charged as follows:

That if it was proved that the Superior Court of Sumter county, in 1844, passed an order for the sale of the negro in dispute, and that said negro was afterwards sold by the Sheriff, in pursuance of said order, the purchaser got a good title against the plaintiffs. You will not look behind the order to see whether the same was regular or not. If the order of sale was passed by the Court, everything will be presumed in favor of its regularity, so far as the purchaser of the negro under the order is concerned.

And further: If there had been irregularities in procuring the order of sale in May, 1844, in such case, although Warren and James White may both have had notice thereof, yet if Sneed, the intermediate purchaser, bought without notice thereof, then defendants can protect themselves under said want of notice in Sneed, in the same manner as if defendants had been innocent purchasers, without notice.

To which charges plaintiff's counsel excepted, and which, together with the rulings of the Court already mentioned, are now assigned as error.

B. HILL; W. A. HAWKINS, for plaintiffs in error.

H. K. McCAY, *contra*.

By the Court.—LYON, J., delivering the opinion.

The first question made in the record is, as to the admission of the order, from the Minutes of the Superior Court of Sumter county for the sale of the negro in controversy, as evidence against the objection of the plaintiff.

This order was passed and allowed by the Court at May

Term, 1844, as an amendment to a decree that had been rendered in an Equity cause that had been pending in that Court between Elizabeth Dinkins, by her next friend, Horace Dinkins and Mark M. Brown, a former trustee for the trust property secured to the separate use of Mrs. Dinkins for life, with remainder to her children, calling on him to account to her for the profits of said trust, and asking the Court for the appointment of a new trustee, and his removal; but which Equity cause had been tried and a decree rendered at the March Term, 1840. The negro boy Lev, or Levi, was one of the trust negroes, and was embraced in the original bill and decree.

To that bill the children of Mrs. Dinkins, and the plaintiffs in the present action, and who were entitled to the negroes under the deed from William P. Brown, after the death of their mother, Mrs. Dinkins, were no parties, either directly or indirectly. They were not represented in that suit.

Upon these facts, we are clear that the order of the Court passed four years after the original cause had been disposed of, on the *ex parte* motion of the solicitors for the complainant in the bill did not affect or bind these plaintiffs, who were no parties to the original proceedings or amendatory order, and had no notice whatever of it. As to these plaintiffs, such order was absolutely null and void. A party, to be bound by a judgment, must be a party to such judgment—must have notice of the proceeding, so that he can be heard, else the judgment does not affect him or his interest. For these reasons, the Court ought to have excluded the order as evidence.

2. The copy advertisement, as testified to by Wheeler, the Sheriff, who sold the negro under the same, was competent evidence, and ought not to have been excluded. Wheeler testified that it was a copy of the advertisement taken from the paper in which the property was advertised for sale in his presence, and a copy of the advertisement under which the negro was sold. What higher evidence would the newspaper containing the advertisement have afforded than this? It was but a copy itself. What higher evidence would the original writing which the Sheriff sent to the printer have been than this? That was but the act of Wheeler. So is this, and sworn to.

It follows, from what I have already said, that the Court

Wiley vs. Warmock et al.

in his charge as to the effect of the order of the Court at May Term, 1844.

The purchaser, at the sale, by the Sheriff, under the order of May Term, 1844, got no title whatever by that sale or purchase, as against these plaintiffs, and for the reasons already given; and that is, that the order of sale was void as to them, and the purchasers under the purchase at such sale got no better title to the negro by such purchase than the first purchasers had, whether they bought with notice or without; and so the Court ought to have instructed the Jury.

Verdict reversed.

WILEY vs. WARMOCK *et al.*

A tract of land is held and known as a whole, a possession of a part may be a possession of the whole, to the extent of the paper title under which it is held; so, too, where the whole tract, as such, is claimed by the adverse party, perhaps the possession of a part may be construed into the possession of the whole. But where a tract or settlement of land is made up of lots or parcels, and the adverse claim is to one only, then the possession of another part of the tract cannot ripen into a statutory title as to a particular lot claimed.

Five or ten acres of a lot of land, covered by water, is inclosed by a fence in the absence of all proof to the contrary, the presumption is, that it was done by virtue of the claim of right to the premises so inclosed; especially when the act is accompanied by a contemporaneous declaration that that lot, and the one contiguous, all belong to the occupant.

Verdict, in Lee County. Tried before Hon. ALEXANDER L. LEE, March Term, 1859.

Wiley vs. Warmock et al.

For the facts of this case, see the opinion of the Court.

WARREN & WARREN, and W. A. HAWKINS, for plaintiffs in error.

HINES & HOBBS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We think the Court erred in charging the Jury that if Wiley inclosed a part of the lot No. 229, around the pond, simply to avoid making a fence through the water, and not under claim of title, then the Statute did not bar the plaintiffs, and they would be entitled to recover.

Wiley owned a large body of land, some thirteen hundred acres, conveyed to him by Shotwell, and of which tract the lot in dispute made a part. He seeks to sustain his plea of the Statute upon two ground—1st, That his occupation of a part of this tract is an occupation of the whole; and 2d, That his inclosure of from five to ten acres of a pond on lot No. 229, in 1845, more than seven years before this action was brought, gives him a statutory right to this particular lot.

As respects the first position, it is true, only with this qualification: That where a tract of land is well known as a whole, possession of a part is possession of the whole, to the extent of the defendant's paper title. So, too, where the claim of the adverse party is to the whole of the land, then the occupation of a part may constitute adverse possession of the whole.

But where a large body of land is made up of different lots, and the claim of the plaintiff extends only to one lot, it would be dangerous to hold that a settlement upon any part would oust the plaintiff of his right of entry to any part.

But what is the proof as to the inclosure of from five to ten acres of lot No. 229 in 1845? The fence then built by Wiley has remained ever since. When he made this inclosure, so far from owning title in another, the overseers who were engaged in putting up the fence said it was all Wiley's land anyhow. There was no evidence to authorize the Court to qualify the possession of Wiley as it did by the charge

McDougald vs. Maitland, Kennedy & Co.

the contrary, there was not only the open, visible, not occupation, but that, too, under claim of right by his or overseer. And if this be so, then, certainly, this occupation of lot No 229, by an inclosure, was a possession to the extent of the boundary of the lot No. 229, the case in dispute; and that being so, neither the charge of the verdict of the Jury, rendered probably on account of the charge, were sustained by the testimony. The motive of Wiley in fencing in the pond was demonstrated by his act, and his declaration was indicative of his motive, in accordance with his act.

McDOUGALD vs. MAITLAND, KENNEDY & CO.

Case is to be transferred from an old county to a new one. In Court the case must be established, before the transfer, in the old county until the Court papers have been turned over to the new county, there can be no prosecution of the case there, nor default in failing to prosecute there.

1, &c, in Chattahoochee County. Decision by Judge June Term, 1859.

11 of Exceptions sets forth the facts of this case as

1. Dougherty, Esq., moved the Court to grant an order upon the docket of said Court a claim case of Kennedy & Co., plaintiffs in *ft. fa.*, against James M., defendant, and Duncan McDougald, claimant; in support of said motion exhibited the papers in the two orders granted by the Superior Court of Muscogee County, ordering the papers in the case transferred to

McDougald vs. Mauland, Kennedy & Co.

this county. Said Dougherty stated that the land levied on was in the county of Chattahoochee, and that, when the first order was taken, the affidavit, bond and execution in the case were lost or mislaid; that the affidavit and bond, after diligent search, were not found until about twelve months since; and that the *fi. fa.* was not found until after the last term of this Court; and that the papers were not transferred sooner because of said loss. And he further stated: That he could not establish the bond and affidavit because he had never seen them; that the Sheriff, on whose affidavit they had been once established, was dead, and, therefore, he continued the search, as before stated.

The claimants showed the claim docket of this Court, on which the case was entered, and that a certified copy of the first order, transferring the case, was brought from Muscogee, and the case put on said claim docket; and, also, an order on the Minutes of the Court, at the August Term, 1858, dismissing the levy in the case.

The plaintiff's counsel, then, showed that the case was on the appeal docket in Muscogee, and should have been placed on the same docket in this Court; that he had no notice of the order dismissing the levy, and did not know of the same until to-day; that he had not attended the previous terms of the Court because of the loss of the papers aforesaid—believing the same had not been transferred.

On this showing of counsel for plaintiff, the Court granted an order, rescinding the former order dismissing the levy, and ordered the papers to be filed and the case placed on the docket for trial.

The counsel for claimant excepted thereto.

JOHNSON & SLOAN, for the plaintiff in error.

DOUGHERTY, *contra*.

By the Court—STEPHENS, J., delivering the opinion.

This levy had been dismissed at a prior term of the Chattahoochee Court for want of proper prosecution without notice to the plaintiff in execution, or his counsel, and the propriety of re-instating the case, turns upon the question:

was the proper county in which to establish the lost in the case, Muscogee, the old county, which had to be the case, or Chattahoochee, the new county, which to receive it? The old county is the most convenient for establishing the lost papers, because there are the persons who are most likely to have a knowledge of the papers which are to be established. But the old county is the proper place for a stronger reason. The Court, there, has transferred the case, and a very essential part of the transaction is the turning over of the Court papers which are necessary to the further prosecution of the case, and when these papers are *lost*, they must be established *before* they can be recovered. The old county, therefore, is the proper place for prosecuting the case up to the point of putting it in controversy to be transferred, and before this point was reached, the plaintiff could not be in default in failing to prosecute in the new county. Before then, he could not prosecute in the new county, for it was not there. For any remissness in prosecuting the case before the turning over of the papers, the old county, where the case was, was the proper place to prosecute and not the new county, where it was not. We think, therefore, that it was properly allowed to be entered on the docket in Chattahoochee county, where the Court papers, pertaining to the case, were turned over by the Court in Muscogee.

Verdict reversed.

Tennell vs. Ford et al.

ing Law, who intermarried with Calidonia Ford, daughter of Ann A. Ford, for a partition of property, real and personal, jointly held by the defendants and deceased, in his life-time, as was alleged, and for an accounting by defendants to complainants for the share of deceased in said property and in the rents, issues and profits thereof in defendant's hands.

At the trial Term of the case, counsel for the parties agreed to submit to the decision of the Court below the question which arose out of the construction of the Will of William P. Ford, sen., deceased, and which involved the chief point of controversy between the parties; which Will is as follows:

"GEORGIA, EARLY COUNTY:

"In the name of God, Amen: I, William P. Ford, of the county and State aforesaid, being of sound mind and disposing memory, and conscious that we must all die, do make and ordain this my last Will and Testament:

"First. I wish all my present debts to be paid.

"Second. That my property, both real and personal, to be kept together until my children arrive at age or marry, then to be equally divided between them and my companion. Should either of my children die before arriving at age or without issue, their share to be equally divided between the survivors. That portion falling to my wife, Ann A. Ford, at her death, to revert to the benefit of my children, viz: William P. Ford, Caledonia Ford, and James Albert Ford, and their heirs.

"Third. Should my executors deem it advisable, they are authorized to sell that portion of my real estate known as my Mill tract.

"Fourth. My plantation on the Chattahoochee river, I wish kept up, and the proceeds of the farm, after defraying all necessary expenses, to accrue to the benefit of my wife and children until a division shall be made. It is my desire that my children shall be educated liberally and completely, and my sons may choose such professions as to them may seem meet.

"Fifth. I constitute and appoint James P. Holmes executor, and my wife, Ann A. Ford, my executrix, of this my last Will and testament.

"In witness whereof, I have hereunto set my hand this

seal, this nineteenth day of April, eighteen hundred and forty.

(Signed)

"WM. P. FORD.

"Signed, sealed and delivered in presence of

"JOHN DILL,

"M. J. HOLLY,

"SAMUEL GAINES."

It was further agreed that William P. Ford, complainants' intestate, died without child or children, leaving his wife, Caroline A. Ford, his sole heir still in life. James Albert Ford died after the death of his father, and before the death of his brother, and before arriving at twenty-one years of age.

The Court below decided that William P. Ford's share of the estate went over, after his death, to his surviving mother and sister, there being no estate-tail created in said Will, and therefore that plaintiff could not recover.

To this decision counsel for complainant excepted, and assigns the same as error.

CULLENS, for plaintiff in error.

LAW & SIMS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. For the reasons given in the case of *Burton vs. Black*, decided during the present Term, we do not think that this Will creates an estate-tail in the children of the testator, and we think the limitations over in favor of the survivors are valid.

2. The only other question is, have the events happened on which those limitations are to take effect? We think that in the case of *Albert*, they have, and that in the case of William, whose administrator is suing, they have not. The share of each child is to go over to the survivors, if he dies before arriving at age or without issue. Albert died before arriving at age and without issue, and his share clearly goes over. Before passing from his share, I will state what goes over, and to whom it goes. He took one-fourth of the tes-

Tennell vs. Ford *et al.*

tator's estate on the division between the three children and the widow. That fourth goes over, and being on estate in possession, it was recoverable at his death. He also took one-third of his mother's share, in remainder after her death. That third of another fourth being a vested remainder, goes over also, but being a remainder, cannot be recovered until it falls into possession at her death. We think the term "survivors," to whom it goes, includes only his surviving brother and sister, and not his mother. The language is, "should either of my *children* die, &c., his share shall go to the survivors;" that is to say, to the survivors of the *children*. This view is corroborated by the subsequent direction that the share of the wife shall go to the children after her death, showing that what was given to her was not intended as a final disposition of the property, while the gift to the "survivors" is an evident finality. Now, as to William's share: Under a strict construction of the words of the Will, his share also would go over, for it is to go over if he dies before arriving at age or without issue, though not before arriving at age. But we think this is just the case where "or" is to be construed "and." When the testator said that the estate should go over if the first taker should die before arriving at age or without issue, he meant *and* without issue, intending that it should not go over, but should continue as he had given it, if the first taker should either arrive at age or leave issue at his death. This is the necessary construction in order to make the testator consistent with himself. The causes which he intends to have the effect of retaining the estate in the first taker, are not whimsical or irrational, but have a reason and force in them which show their scope and extent—the influence that each had on the mind of the testator, and the effect that is due to each of them. These causes are the full age of the first taker, and the existence of issue of his at his death. Why was the full age of the first taker to have any influence in retaining the estate in him? Because, at full age, he would have the judgment of a full-grown man, and the legal capacity to dispose of the property for himself. The indication from this is, that the testator intended to concede to the first taker at least some power of disposition over the property, after he should be in a situation to exercise it with judgment and effect. I make no suggestion at present as to the extent of the power. I only say

Tenbell vs. Ford et al.

the full age of the first taker could confer no quality of a capacity for disposing of the property, and that the indication from that source is, that the testator intended to abandon to another some portion of the power of disposition. We get no light from this quarter as to the testator's wishes or preferences concerning the course of the property beyond the life of the first taker, but we do get light at point from the part which is to be played by the issue of the first taker. I do not mean to say that the testator intended the issue to take any direct interest as purchasers under his Will, but I do say that he wished them to the benefit of the property. It is wholly immaterial, as the present purpose is concerned, whether he excluded them to get that benefit directly as purchasers, or indirectly as heirs at Law of the first taker. The true point at issue here is the only place where we get an indication as to what persons were preferred by the testator after the death of the first taker, and that the indication is in favor of the issue. Why should the existence of issue be allowed to have the least influence in preventing the estate from going over to the issue?

True, the testator makes no disposition in their favor, but he does make a disposition in favor of the remaindermen when he indicates that, so far as his own wishes are concerned, the estate ought to be kept from going over for the sake of an uncertain benefit to the issue, rather than go over for the sake of a certain benefit of the remaindermen, he shows how strongly he preferred the issue to the remaindermen. This assures us that the testator, when he was making a disposition of his estate, did not intrusting the disposition to another, did not make a disposition which would put the property out of the reach of the issue for the benefit of the remaindermen in the very probable event of the first taker's dying.

He would not hold back the estate from going over to the benefit of the issue who could get only such of the estate as might be left to them by an adult first taker with a capacity of alienating it, and yet, refuse to hold it for the benefit of issue who would take from a minor without power of alienation. And yet, the testator made just such a disposition, if he really intended what he said that the estate should go over, if the first taker should die before arriving at age or without issue. These facts carry the estate over, if the first taker dies before arriving at age.

Bell et al. vs. Rawson et al.

riving at age, although he may leave issue. This is against the necessary force of the motive which the testator himself reveals to have been operating on his mind. The use of the word "or" is against the whole current of his thought, and we know, therefore, that he did not mean "or," but did mean "and," which is required by the force of that current. The fact that there is in this case no issue to be cut out, is immaterial. The question is one of intention in the testator. He meant "and" when he said "or;" that is to say, he meant that the estate should not go over, unless the first taker should die, not only without issue, but also before arriving at age. William died without issue, but *after* he had arrived at age. His share, therefore, did not go over, and his administrator is entitled to recover it.

Judgment reversed.

BELL et al. vs. RAWSON et al.

1. The appearance of a principal in a *ca. sa.* bond at the Term when he is bound to appear, is a discharge of his sureties.
2. After a defendant in *ca. sa.* has given bond, his re-arrest under the *ca. sa.* at the instance of the plaintiff, is a discharge of the sureties.

Motion to Set Aside Judgment, in Baker Superior Court. Decided by Judge ALLEN, at May Term, 1860.

A *ca. sa.* process having issued in favor of Rawson & Moriman, against James D. Hampton, returnable to the November Term, 1858, said Hampton was arrested thereon by the Sheriff during the session of the Court at the preceding May Term, and was, by order of the Court, discharged because he was then in attendance upon the Court as a party in an

Bell et al. vs. Rawson et al.

suit. It appears that he was subsequently arrested, gave one Keaton as his security on *ca. sa.* bond, and was surrendered up in Court by his security at the November Term and placed in the custody of the Sheriff, who gave a second bond, with James B. Bell and others, as securities thereon, for his appearance at the next Term of Court. At the November Term, 1859, said bond was dissolved and judgment entered up against the parties thereto on account of the non-appearance of the said Hampton. On said judgment a *fi. fa.* was issued against said principal and securities, and was proceeding against them, when said securities filed their affidavit, alleging that said *fi. fa.* was wrong against them illegally on several grounds, which were read at the hearing, overruled.

The defendants then moved the Court to set aside said judgment of forfeiture on several grounds stated; among them the following, and the only ones deemed necessary to be given:

Because the said James D. Hampton, the principal, did "appear" at the May Term, 1859, of said Court.

Because plaintiffs, under said *ca. sa.*, arrested said defendant, thereby taking him from the custody of his sureties, and placing him in that of the Sheriff, who released him from custody by Hampton's giving another *ca. sa.* bond with new security.

for plaintiff in error.

PER & SLAUGHTER, *contra*.

Court.—STEPHENS, J., delivering the opinion.

It was a motion to vacate a judgment of forfeiture which had been rendered without notice to the defendants. The Court held that it would have been good to prevent the judgment, therefore good to vacate it. One cause assigned was that the principal had in fact appeared at the Term of Court, and was bound to appear. This Court, in the case of *Davidson*, 28 Ga. Rep., 536, held that the appearance of the principal is all for which his sureties on a

Cain vs. Busby et al.

ca. sa. bond are liable. This ground, therefore, was a good one.

2. Another ground was, that the principal had been taken out of the custody of his sureties by the plaintiffs in *ca. sa.* through a second arrest under the *ca. sa.* The sureties say that they were discharged from their bond, because the act of the plaintiffs in *ca. sa.* had deprived them of their legal power to comply with it. Surely this also was a good ground for vacating the judgment.

Judgment reversed.

CAIN vs. BUSBY *et. al.*

1. It is error in the Court to charge the Jury on a state of facts not warranted by the evidence.
2. If one who claims title to property be present when another makes a voluntary conveyance to third persons and does not object to the making of such deed, it is a circumstance to show that such person had no title to the property conveyed, but recognized the title to be in the donor.
3. Although the charge excepted to is evidently a mistake, still, if it stands in the record as the act of the Court, and is erroneous, such error must be corrected.
4. Although a party impliedly admit title to be in another, he may, notwithstanding, show that he had the title and if he does, satisfactorily, his title will be protected against such admission.
5. It is illegal for a witness to testify that one made other deeds of gift of all her property among her children. The deeds themselves are the best evidence of the fact, as well as of what they conveyed.

Trover, from Baker Superior Court. Tried before Judge ALLEN, November Term, 1859.

Nimrod Busby, jr., and wife, and Samuel A. White, guardian of Mary Jane Cain and John R. Cain, jr., brought

their action against John R. Cain to recover four slaves, viz: Mary, Harriet, Martha and Green.

On the trial, the plaintiff in the Court below introduced the following evidence:

Silas A. Stokes testified: That he wrote the deed of gift from Lydia Cain to Benjamin Cain's children; he was one of the witnesses; saw it executed by the donor, Mrs. Cain; was executed on the day it bears date; plaintiffs are the children of Benjamin Cain; White, who sues as guardian, married the widow of Benjamin Cain; Elizabeth Cain married Busby, one of the plaintiffs; she is under 24 years of age; John R. Cain, another of the plaintiffs, under 21 years; the deed was made at the house of Penelope Cain, widow of Benjamin, in Macon county, Ga.; Lydia Cain the donor, lived a little piece off, in the same neighborhood; defendant lived with his mother; Lydia Cain, defendant's mother, moved from Emanuel to Macon county; she resided there when witness moved to the county of Macon, in 1834 or '35; defendant moved to the county some years after, and lived in the same house with his mother, Lydia Cain; during all this time the negroes were in the possession of Mrs. Cain, including the time she and defendant lived together; Lydia Cain had possession more than four years before execution of the deed; the defendant moved away from Macon county in 1845 or '46; does not know whether he carried the property mentioned in the deed with him; Lydia Cain was not in debt at the time of executing the deed; does not know what was the condition of defendant at the time; defendant was present or about the house when the deed was executed; helped witness bring the table on which the deed was written; at the same time, Mrs. Cain made similar deeds of all her property to her other children, one of which was to defendant; Benjamin Cain's children were the grandchildren of Lydia Cain; the latter remarked at the time that she would have to keep her negro woman Mary to wait on her while she lived; at the date of the deeds, she had no negroes except Mary and her children.

The deed of gift from Mrs. Cain, dated June 16th, 1842, for Mary "and her increase," to Elizabeth Ann, John R. and Mary Jane, heirs of Benjamin Cain, deceased, was then read. Said deed recorded in 1845.

Mary Simpson testified: That she saw the woman Mary

Cain vs. Busby et al.

at defendant's house in 1851; saw her last in 1852; she was cooking and doing house work; did not see defendant use any control over her, though she was waiting on defendant's wife; knew Martha, who was about 9 years old; did not know the names or ages of the other two.

Pleasant A. Waddell testified in relation to the value of said negroes.

Frederick A. King testified, that defendant told him that his motive for going to Randolph county was to run Mary and her children after his mother's death, and to keep them out of the hands of Samuel White. He testified in relation to the value of the hire. Lydia Cain died in 1849.

Pleasant A. Waddell again testified: That said negroes were in possession of defendant from the year 1847 until the year 1852, with the exception of three or four months; defendant had said negroes run off to Early county, and were then in possession of James Crawford, and during the time Crawford had them, the defendant told witness that Samuel White never should have them in his possession, and that he was willing to settle with the heirs and pay them \$200 a piece for their claim on said negroes.

Frepkerk J. King testified: That there was a division of negroes by Lydia Cain, and witness received one of the deeds, made to his wife's heirs, of the same family of negroes; defendant went with witness and saw the deed recorded, and made no objection to it; heard him say he had bought Snell's interest, who was one of the heirs of Lydia Cain, and that he intended to buy the interest of the other heirs.

Jesse Robson testified: That he knew Mary, a negro woman, in possession of defendant, ever since in 1845, with her children. He gives their value, &c.

Frederick J. King again testified: That he heard defendant say, between 1840 and '44, that he was not able to pay his debts, and was \$1,200 worse than nothing; knows of no property he owned or claimed from 1844 to '49; he got into a fight with Hiram Hall, bit a piece of his lip, and Hall got a warrant for him; he was lying out, and his mother interceded and settled the case, and defendant came to witness' house and the case was there settled; his mother gave five cows and calves to settle the case; was acquainted with her from 1834 to '44; she never was enthralled with debt in any way while he knew her; she was arrested in a case of trover

pel her to give up William T. Cain's property, which
ty she had in possession; she never was arrested for
uring her life; defendant paid no debts for his mother,
as witness knew; she generally settled his; witness
e a negro woman named Mary, in right of his wife,
ession; never sold her to any person; Mrs. Cain, wit-
other-in-law, got witness to make a deed to her "for
tion," and when witness went to sign it, saw it was
Cain; never received anything from defendant for
groes; the negroes were then in Mrs. Cain's posses-
d were never out of her possession during her life.
plaintiff here closed.

ndant then introduced the following evidence :
; Hatfield and wife testified: That they had known
Cain from 1840 to '44, and regarded her as unsound in
nd wholly unfit to transact any sort of business; wit-
ime to that conclusion from the fact that it took
e to mind her when she was with them.

Hatfield says that she frequently heard Lydia Cain
the negroes that were there were for John R. Cain.
Banier and Mary King testied: That Frederick J.
virtue of his marriage, became entitled, from the
Nathaniel, Cain, to four negroes—a woman named
l her three children; Mary is now in possession of
Cain, and has been for a number of years before he
Randolph county; he has been in Randolph since
l has claimed the negroes all the time as his own;
ildren now in possession of defendant are, Jack,
Martha, Nicey, Charles and Isaac; defendant
lary and her children before and after Mrs. Cain's

dated 1st day of February, 1836, from Frederick
o John R. King, conveying to him all the interest
rmer in the estate of Nathaniel Cain, deceased, in
on of the sum of \$100, was then read to the Jury.

bill of sale, dated 21st day of February, 1845,
a Cain to Barnabas L. W. Snell for Mary and her
n consideration of the sum of \$500.

bill of sale of same date from said Snell to defend-
ry and her children, for the consideration of \$500,
recites that said negroes of right belong to said de-

Cain vs. Bushy et al.

The Jury having returned a verdict for the plaintiff, counsel for defendant moved for a new trial on the grounds following:

1st. Because the verdict is contrary to Law and the weight of the evidence.

2d. Because the verdict is contrary to the charge of the Court.

3d. Because the Court erred in its charge to the Jury in this, viz: "That if the Jury believe, from the evidence, that Lydia Cain, for four years previous to 1842, held the property sued for adversely, claiming the same, and made the deed of that date to plaintiffs, and the defendant was present consenting to the same, and took a benefit therefrom, then the plaintiffs are entitled to recover in this case.

"That if the above is true, then it would make void the deed both of 1836 and 1845, so far as this case is concerned.

"That the deed of 1845 conveyed no title from Lydia Cain, if she made the deed of 1842.

"That the deeds of 1836 and 1845, the one reciting the other, must be construed to mean one paper and one transaction, and must stand or fall together; and if the Jury believe they were obtained by fraud, then they are void as to the plaintiffs."

4th. Because the Court erred in refusing to charge as requested by defendant, but in qualifying the same, as hereinafter stated:

1st Request. "When two persons are in possession of personal property, one being without title, and the other with it, the possession is in the latter."

The Court charged this as true, when the possession of both parties took place at the same time; but the proposition did not apply when both parties did not go into possession at the same time.

2d. "That the silence of the defendant at the time of the voluntary conveyance to plaintiffs, does not estop him from setting up his previous title, his silence not being any fraud on them, if they paid no value."

The Court qualified the request by stating, "unless defendant took some benefit or advantage thereby."

3d. "That a voluntary conveyance of a slave, if not put on record within twelve months, is void as against subsequent purchasers without notice; and if the Jury believe that Snell

Cain vs. Busby et al.

was such a purchaser, then the plaintiffs are not entitled to recover."

This the Court qualified by stating that the deed of 1854, reciting the deed of 1845, are to be construed together as one act.

5th. Because the Court erred in allowing the witness Stokes to testify that Mrs. Cain, at the time of making the deed in 1842, made deeds of gift of all her property amongst her children, defendant's counsel objecting thereto, on the ground that the deeds were better evidence of what Mrs. Cain did with the property at the time.

The Court refused the motion for a new trial, and counsel for defendant excepted.

VASON & DAVIS; SLAUGHTER & ELY, for plaintiff in error.

No appearance for defendant.

By the Court.—LYON, J., delivering the opinion.

The testimony in this case is very conflicting and unsatisfactory—so much so, that it is impossible to tell, with any degree of confidence or certainty, where the true title is. To illustrate: Stokes, who is a witness for the plaintiffs in the suit, testifies, that Lydia Cain, under whose deed of gift the plaintiffs claim, was living in Macon county in 1834 or '35, when he moved to that county. Defendant moved to that county some years after and lived with his mother. During all the time, however, before and after defendant moved to Macon, old Mrs. Cain had possession of the negroes. She had possession more than four years before the deed was made. Defendant was present at the making of the deed, and made no objection. This is all of the plaintiff's title, and looks like a plain one. On the other hand, Frederick J. King, a brother-in-law of Cain's, introduced by the plaintiffs, says, he had this negro woman Mary in right of his wife, and made a deed of her to the defendant, though he made it to satisfy old Mrs. Cain, his mother-in-law, and intended to make it to her, but when he signed it, said that it was to John R. Cain. The deed he did make to John R. Cain—at least the one that was put in evidence—was for his interest

Cain vs. Busby et al.

in the estate of Nathaniel Cain, deceased, and no negro's name is mentioned, nor any other property, and purports to be in consideration of \$1,000. Mary King, the wife of Frederick, and sister of defendant, and Jane Lanier, another sister, both testify that Frederick King, by virtue of his marriage, became entitled to Mary and her three children from the estate of Nathaniel Cain. Now if this is true, the negroes did not belong to Lydia Cain, so as to enable her to convey them to the children of Benjamin Cain. But if they belonged to the defendant, why did he want to run them off, to keep White, the guardian, from getting possession of them? or why was he willing to buy the interests of the heirs in these negroes and give them \$200 apiece for their interests? And I will remark here, these admissions were not applicable to the plaintiffs, though used in that way. The heirs, John R. Cain alluded to, were the heirs of Lydia Cain or Nathaniel Cain, for he says, in immediate connexion with these admissions, that he had bought Snell's interest, one of the heirs, the witness says, of Lydia Cain, but he was also of Nathaniel Cain. Now, a very pertinent inquiry arises here: How did Lydia Cain acquire title to these negroes, if she ever had one? It strikes me that an answer to that question might end the doubt. Some of these witnesses, the children of old Mrs. Cain, ought to be able to explain the whole matter. They have not done so, but have left the matter in so much doubt that it is difficult, if not impossible, to tell where the true title is. As it stands, it is a question exclusively for the Jury to determine.

1. We think, under the facts of this case, the Court below, instead of charging the Jury "that if they believe, from the evidence, that Lydia Cain, for four years previous to 1842, held the property sued for adversely, claiming the same, and made the deed of that date to plaintiff, and defendant was present consenting to the same, and took a benefit therefrom, then the plaintiffs are entitled to recover," should rather have charged, that Lydia Cain must have been in the possession of these negroes for four years previously to 1842, holding and claiming them adversely to John R. Cain, to entitle plaintiffs to recover against defendant under a statutory title in her favor, but if she held possession of the negroes jointly with him during that period, such possession could not create a statutory title in favor of, or against either.

That if defendant was present when Lydia Cain made deed of 1842 to plaintiff, and did not object thereto, it is a circumstance going to show that at that time he had no interest in the property himself, but recognized the title as being in Lydia Cain. The evidence did not altogether authorize the charge as given. The evidence showed her to be in possession, but it also showed defendant to be equally in possession. The evidence did not show that either claimed adversely to the other, nor was there any evidence that the defendant assented to the making of the deed. It is true that defendant was about the house, and very probably knew of its execution, but he did not assent or object, as the evidence discloses, and in a case of so much doubt as this, a very slight difference of opinion might make a very material difference in the result.

Why should the Court have charged the Jury, "that the deed of 1845," (alluding to the deed from Mrs. Cain to John R. Cain) "conveyed no title from Lydia Cain, if you believe in the validity of the deed of 1842." That deed purports to be for full consideration, and if it was so in fact—of which you are to judge—it did convey a title, notwithstanding it had made the deed of 1842, which is a voluntary one; conceding that the negroes belonged to Mrs. Cain; that charge takes it for granted that the title was in her, which the defendant denies.

The charge of the Court, "that the deeds of 1836 and 1845, reciting the other, must be construed together, as one paper and one transaction, and must stand or fall together, and if the Jury believe that the deeds were obtained by fraud, then they are void as to the plaintiffs," was evidently a mistake. The Court must have alluded to the two deeds made by Mrs. Cain to Barnabas L. W. Snell, the first in February, 1845, and the one from Snell to defendant, dated 28th October, 1854, for the latter deed recites the former, and goes very far to show that the deed of 1836 was a contrivance to get a title into John R. Cain for the negroes, but the deed of 1836 is from a different person, and has no connection with either of the others. Upon the record as the charge of the Court, it is manifestly incorrect, and must be corrected.

The Court ought to have given the charge requested by the plaintiff, without qualification; that is,

- "that the silence of the defendant at the time of the execution of the voluntary conveyance to plaintiff, does not estop him from setting up his previous title." The effect of the defendant's silence at the making of that deed, as we have stated, was only a circumstance going to show that he had no title at the time, but recognized the title as being in Mrs. Cain; but still, if the negroes really belonged to him at the time, or did not in fact belong to Mrs. Cain, it is his right to show it; and if he does show it satisfactorily, he will be relieved from the effect of such implied admission. He is not estopped from denying either that she had the title, or that it was not in him. An estoppel *in pais* exists only when third persons have acted in the faith of such admissions, and changed their condition in consequence. If, for instance, third persons had bought the negroes from the donees under that deed, on the faith of such admissions, then the defendant would be estopped from setting up his own title in opposition to that. *Jones vs. Morgan*, 13 Ga., 526.

It was improper for the witness Stokes to state in his evidence, against the objection of defendant's counsel, that Mrs. Cain, at the time of making the deed to the plaintiff in 1842 made other deeds of gift of all her property among her other children. If she did in fact make such deeds, the deeds themselves were better evidence of the fact, as well as of what they contained.

Judgment reversed.

FRITH vs. THE JUSTICES OF THE INFERIOR COURT.

ment ordering a road to be opened, rendered on the report of reviewers are not sworn, is erroneous.

tionari, in Randolph Superior Court. Decided by Judge MS, at May Term, 1860.

In the year 1859, the Justices of the Inferior Court of Randolph county appointed certain Commissioners to review a report on the laying out of a certain road to lead out of the county, Ga., through a ten acre lot adjoining the town of Macon, in the possession of the plaintiff in error. The Commissioners reviewed the premises and made a report in favor of laying said road, &c.

Afterwards, the Inferior Court appointed certain persons to estimate the amount of damages accruing to the owner of the lot on account of the proposed road, and which appears to have been done without notice to the owner of said lot.

The assessors reported the damages to be one hundred dollars to be paid to the owner of said ten acre lot on the terms of a suit between John Roe and Mrs. Frith respecting titles to said lot.

Thereafter appeared that the Commissioners and assessors had viewed the premises without being sworn. The reports made were made the judgment of the Court, and an order was made making a highway through said lot.

Mrs. Frith being dissatisfied with these proceedings, came by certiorari to the Superior Court, asking that the same be set aside on various grounds: Want of notice of proceedings in their several stages; uncertainty as to the extent of the road; the damages being to be paid to her upon oath, and not absolutely; the failure of the reviewers to be sworn, &c.

On the certiorari, the Court adjudged that the writ was sustained as to the assessment of damages, and that the judgment of the Inferior Court be affirmed as to their laying out the road to the extent of thirty feet.

McLain & West vs. Densmore & Kyle.

To which decision the plaintiff in certiorari excepted.

Hood, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

The Statute requires the reviewers to be sworn, and we think that on account of the failure to swear these reviewers, the whole judgment, which was founded on their report, ought to have been set aside.

Judgment reversed.

McLAIN & WEST vs. DENSMORE & KYLE.

When an application is made for a new trial and refused by the Court, a certificate by the presiding Judge to this fact does not amount to a certificate as to the truth of the grounds upon which the motion was made. It may be that the rule was denied, because the statements embodied in it were not in accordance with the facts which transpired in the cause.

Complaint, from Sumter county. Tried before Judge ALLEN, at August Adjourned Term, 1859.

Densmore & Kyle brought suit against McLain & West for the recovery of \$1,270 92, being the price of goods sold and delivered by defendants in error, who were merchants in Baltimore, to the plaintiffs in error, merchants in America.

The defendants, in the Court below, pleaded—1st, *The general issue*; 2d, That the account sued on had been paid.

McLain & West vs. Densmore & Kyle.

and discharged by the taking and accepting of Miller & West's notes for the amount of the debt.

At the trial, the plaintiffs proved by Thomas Mahool, by commission, that sometime previous to the date of the bill in question, witness was in Americus, Ga., when McLain & West gave him an order to furnish goods mentioned in the bill. The order was forwarded by him to Samuel B. Owings. Subsequently, he had a conversation with defendants, and they acknowledged they had received the goods, and considered themselves bound to pay for them.

Witness was never a note or notes given to S. B. Owings for the bill of goods; he does not know of his own knowledge that defendants gave an order to plaintiffs for goods; the order was given to witness to obtain the goods for them, and the order was forwarded to S. B. Owings; he does not know of his own knowledge from whom S. B. Owings purchased the goods. Defendants acknowledged they had received the goods from Densmore & Kyle, and expected to pay for them; witness does not recollect the precise date of the admissions of defendants to the correctness of the bill, but thinks it was some eight months after the bill; the admissions were made orally, and not in writing.

Owings testified, by commission, that his agent, Mr. Mahool, was in Americus, Ga., a short time previous to the date of the account, and sent him, witness, an order for the goods mentioned in the account, and requested witness to purchase the goods on account of the defendants; witness purchased the goods for them of Densmore & Kyle on account of McLain & West. Witness has never heard defendants speak of the account, nor has witness seen either of them; there never was a note or order given to S. B. Owings or S. B. Owings & Co., for or in payment of said goods; he is not aware that defendants gave an order except the one as stated.

J. Palmer testified, by commission, that he is the book-keeper of the plaintiffs; the account is made up in the plaintiffs' hand-writing; S. B. Owings called at the store of plaintiffs and left the order for the goods mentioned in the bill charged in said account, and directed them to be purchased of McLain & West, which was done; the goods were purchased, and the bill made out in defendant's name; Densmore & Kyle received the notes, as witness thinks; two notes were given to Miller & West for the amount of the account re-

McLain & West vs. Densmore & Kyle.

ferred to ; the notes were not paid, but were protested ; there were not any notes given, in my knowledge, to S. B. Owings or S. B. Owings & Co., for the said bill of goods ; he does not know of any order given by McLain & West for the goods.

Thomas Mahool testified, by commission, that in the fall of 1855 the firm of McLain & West gave him an order for groceries to have filled for them in the city of Baltimore, which order he forwarded to S. B. Owings to hand over to plaintiffs to be filled ; the order was filled accordingly, and McLain & West acknowledged the receipt of the same ; notes were sent on to plaintiffs signed, " Miller & West," instead of Lain & West, with whom the contract was made ; witness told plaintiffs he had received the order from McLain & West, and they had better send them back ; after the notes were protested, witness had a communication with McLain & West in which they admitted they were liable to pay for the goods sent to them, and that the order was from them, and not for Miller & West ; he does not remember the items of the bill, nor the amount precisely, but thinks it was about the amount of the bill annexed to the interrogatories, and also about the time mentioned in the bill. In the conversation witness had with West, Miller was present ; when the admission referred to was made by McLain, that he was bound for the debt, no one was present but him and witness ; defendants did not say they had sent on any notes ; McLain admitted to witness he was bound for the debt ; it was not Miller & West that made the admissions ; McLain made it himself ; witness was acting as agent for plaintiffs to try to make some arrangement to save the debt ; is not now their agent ; the bill of goods was not purchased from S. B. Owings ; the order was not to Owings ; witness told them he would send it to a first rate grocery house ; does not remember that any name was mentioned ; they were not purchased by Owings from plaintiffs ; has no interest in the suit.

The account appended being a copy of the one sued on, is dated November 24, 1855, and is charged by plaintiffs to defendants.

The notes referred to are dated November 24, 1855, payable at five and seven months to Densmore & Kyle, each for \$641 75 ; are signed by Miller & West, and protested for non-payment.

McLain & West vs. Denmore & Kyle.

Adam R. Brown, sworn for plaintiffs, testified, that Miller and West were successors to the firm of McLain & West. He admitted the insolvency of Miller & West, and that of McLain and West; that one of the parties was considered, in the year 1857, and the first part of the year 1857, as solvent; all parties broke about that time; that McLain paid off, as witnesses think, his portion of some of the claims against the firm at 50 cents in the dollar, or his father-in-law did for

The Jury having found for the plaintiffs, counsel for defendants moved for a new trial on the following grounds:

Because the Court charged the Jury that if they believed the account sued on had been paid off by the notes of Miller & West, it was no payment unless it was in proof that Miller & West's notes had been paid.

Because the Court refused to charge as requested by plaintiffs' counsel, that if the Jury believed, from the evidence, that the plaintiffs had agreed to take, and did take, Miller & West notes in payment, that the plaintiffs could recover.

Because the verdict is against law, contrary to evidence and the weight of evidence.

Court overruled the motion, and counsel for defendants accepted.

There was no certificate of the Judge to the bill of exceptions in this case, that the Court charged or refused to charge as claimed of.)

W. & SCARBOROUGH, for plaintiffs in error.

W. & HAWKINS, *contra*.

The Court.—LUMPKIN, J., delivering the opinion.

There being no certificate of the Judge to the bill of exceptions in this case, that he charged or refused to charge as claimed, the only ground of error left is, that the verdict is against law and contrary to evidence and the weight of

The verdict been for the defendants, instead of the plaintiffs, it would unquestionably have been contrary to law,

Rutherford vs. Newson.

because strongly and decidedly against the weight of the evidence. Indeed, it would have been without evidence. The proof establishes, conclusively, that the contract for the goods was made with McLain & West; that the order for them was given by them, and not their successors, Miller & West; that they never received the notes of Miller & West as payment, nor agreed to do so, and that McLain & West distinctly acknowledged their liability for the goods.

The omission of the Court to certify that the grounds taken in the motion for a new trial were true, does not prejudice the plaintiffs in error in this case. The result would have been the same. But it furnishes another fit occasion to remind the Bar of the necessity of taking the precaution to obtain the acknowledgment of the presiding Judge that the grounds taken on the motion for a new trial are true. Not that the motion was made upon the grounds stated in the rule, but that the statements in the grounds are true.

RUTHERFORD vs. NEWSON.

If one, as agent for another, sell and warrant a negro as sound, and afterwards bring suit on the note given for the negro against the purchaser in his own name, he cannot be an innocent purchaser of the note, without notice of the consideration, and if the negro be unsound at the time, and afterwards die of such unsoundness, that is a good defence to that suit.

Complaint, in Quitman County. Tried before Judge PERKINS, November Adjourned Term, 1859.

James Newson brought suit against the plaintiff in error to recover the sum of \$900, or, being the amount of a promissory note which the latter had agreed to give for the purchase of a slave, named Joe; the note being made pay-

Rutherford vs. Newson.

to E. R. Graddy, or bearer—dated the 14th day of 1854, and due by the 1st day of January next there-

the defendant pleaded to this action total and partial failure of consideration in the unsoundness of the slave at the time of the purchase.

The evidence had on the trial discloses these facts:

That Newson, as the agent of Elizabeth R. Graddy, sold and delivered the slave Joe to Rutherford and took a promissory note, above described, of the latter for the purchase money. Newson having moved out of the State, he gave the note with James H. Mercer for collection; the latter afterwards, had it sued, and the suit was brought in the name of said Newson. There was considerable evidence going to show that Joe was not sound and healthy at the time of the sale. No particular disease was demonstrated or proven; but it was proven that Joe complained from time to time of disease in his back and breast, both before and after the sale; and that he was laid up from time to time on account thereof; also, that both Mrs. Graddy and Newson, at the time he sold as her agent, knew of his complaints. On the other hand, it was in proof that the defendant, Rutherford, was a physician, and when he purchased, had Joe in his possession some time before the trade was made—the plaintiff and Mrs. Graddy, being at the time being in Texas; and further, that, at the maturity of the note, defendant promised from time to time to pay it. In December, 1855, Joe was at work while at work, apparently with his old complaint increased, and died in a few minutes thereafter.

The jury, under the charge of the Court, having found in favor of the plaintiff for the full amount of the note, counsel for defendant moved a Rule for a new trial on various grounds, of which the following are all now to be stated:

First, because the Court refused to charge, as requested by the defendant's counsel, as follows:

If the jury believe, from the evidence, that James Rutherford the plaintiff, as agent for Mrs. E. R. Graddy, sold to said man, Joe, to defendant, made a Bill of Sale to said negro, and took said promissory note to

Rutherford vs. Newson.

secure the purchase money agreed to be given for said negro, and as such agent turned over the same to Dr. Mercer for collection, then the presumption of Law is, that plaintiff still continued to hold said note as agent for Mrs. Graddy. And that, if the note had never gone into the possession of Mrs. Graddy, or out of the possession of Dr. Mercer, then it was incumbent on the plaintiff, if he claimed title or property in and to said note, to show that the same had been transferred to him for a valuable consideration.

"Because the Court, on the contrary, charged that, the suit being in the name of the plaintiff, it was *prima facie* evidence that he was the *bona fide* holder of said note for a valuable consideration; that he obtained the same before due and without notice; and that the *onus* was upon the defendant to show the contrary, or to show that plaintiff took the note before due, with notice, in order for the defendant to get the benefit of his defence to said promissory note."

The Rule was refused by the Court on all the grounds taken, and counsel for defendant excepted thereto and assigned the same as error.

B. S. WORRILL and HOOD & ROBINSON, for the plaintiff in error.

DOUGLASS & DOUGLASS, and BEALL, *contra*.

By the Court.—LYON, J., delivering the opinion.

The defendant in error, who was plaintiff in the action, sold and warranted the negro to be sound. The notice, therefore, of the consideration of the note to him was positive and direct. He could not be an innocent purchaser without notice. That principle had nothing, whatever, to do with the case. If the negro was unsound at the time of the sale and died of that unsoundness, of which the proof is pretty positive and direct, the plaintiff in the action cannot recover. Hence the Court erred in the charge as given to the Jury, and a new trial must be granted on that ground as well as the refusal to charge as requested.

Judgment reversed.

MOLYNEAUX vs. COLLIER.

1. A witness is incompetent on the score of interest, either where he will be gainer or loser by the event of the suit, or where the record can be used in his favor in another case, to which he is a party.
2. A witness testifying *ex tunc*, may be contradicted and thus discredited, by his depositions previously taken in the same case, or in a different case involving the same issues.
3. A bond of indemnity to protect a witness against all liability, will not restore him to competency where he is disqualified on the ground of interest.
4. Every contract must be founded upon a consideration, either good or valuable, otherwise it is a *nuda pact*. If a Plaintiff in *fi. fa.* has a lien upon property which is sold for \$5,000, or is worth that amount, and he agrees to accept of \$2,000, or one-fourth of the amount, from the defendant in execution or the purchaser under him, and release the debtor from his liability upon the judgment debt, the agreement is gratuitous and cannot be enforced.
5. Where a defendant in *fi. fa.* has deliberately, and repeatedly, verbally and in writing, recognized the debt as good and subsisting, and promised to pay it, it is error in the Court to assume that these admissions and declarations were made by the defendant in ignorance of his rights, for the purpose of reconciling his conduct with the contract which he now seeks to set up in his discharge; on the contrary, they rather tend to prove that no such contract was ever entered into, or at least, that the defendant did not understand it as releasing him from liability.
6. A Court of Equity will not only relieve against a contract founded in fraud that is, a suppression of the truth or a suggestion of falsehood, but also where both parties honestly labor under a mistake or misapprehension of the facts.
7. Where a creditor agrees to accept from an insolvent debtor, a less sum for a greater, to be paid in personal service, (instead of property) or the debt of a third person, it is a valid contract; *aliter*, if the debtor was solvent.
8. A complainant coming into equity, seeking to be discharged from the payment of a just debt, must make it appear that his claim is not against honor and conscience.

In Equity, from Dougherty County. Decided by Judge ALLEN, at June Term, 1859.

This was a bill filed by George W. Collier, and has heretofore been before this Court, as stated in 17th *Georgia Reports*, page 46. The material allegations of the bill are about as follows:

Collier, Bracewell, and St. George, entered into a copartnership in 1838 for the purpose of merchandizing at Haw-

Molyneaux vs. Collier.

kinsville, under the name of Collier & Bracewell. Edward Molyneaux recovered judgment against Collier & Bracewell with St. George as security on the appeal for \$9,360, with interest and costs. The firm was insolvent, and the partners, individually liable, were in doubtful, if not insolvent, circumstances. John Rawls, with a full knowledge of these facts, purchased this fi. fa. from Molyneaux, and held it against the partners. He was President of the Bank of Hawkinsville, and a large stockholder therein, and as such controlled large fi. fas. and mortgages against St. George. Bracewell had possession of some property, but there was a cloud over his title—it being claimed by his son-in-law. Collier, the complainant, was insolvent.

Under these circumstances and in view of these facts, Rawls proposed to Collier, Bracewell, and St. George, that if each one of them would, from his personal efforts and yearly labor, pay to him one-third of the amount of said fi. fa., he would release and discharge the one so complying with this offer from all further liability thereon. Collier and St. George, each, complied with this proposition. Bracewell failed to comply, and in 1840 removed beyond the limits of the State, carrying with him the property, negroes, and stock in his possession. Rawls permitting him so to remove without attempting to stop him or to levy on and try the title to said property, against and in spite of the remonstrances of Collier and his earnest appeal to levy thereon. Rawls died, and his widow and C. Taylor, became administrators on said estate. With the view to defraud Collier and St. George, the administrators procured Molyneaux to transfer the said fi. fa. to the Merchants' Bank of Macon, in whose name it was proceeding at the time of the filing of the bill, having been levied on the property of Collier for the payment of the remaining third due thereon.

In the bill, as originally filed, it was alleged that Bracewell carried away property amply sufficient to pay said fi. fa. and that Rawls permitted him to remove. In an amendment this allegation was modified as previously stated. The amendment also alleged that St. George, although possessed of a considerable estate, was, nevertheless, largely involved and that Rawls had a large claim against him; and if all his debts were pressed against him, he would have proved to be insolvent.

Exhibits of the mortgages and debts due by St. George, were not attached to said bill. The amendment alleged various payments by St. George, and also claimed a credit from the sale of a negro, the property of Collier, and prayed discovery as to the payment on said *fi. fa.* The prayer was for injunction and general relief.

The bill was subsequently amended, and charges that in 1842, John Rawls, in consideration that complainant was in insolvent circumstances, agreed with Jonathan Davis and complainant that if they would secure the payment of one-third of said *fi. fa.*, by giving him a negotiable note on one Harrison Jones who was then negotiating with Davis for some negroes originally owned by complainant—the note to be for ten thousand dollars, and the balance agreed on to be paid by Davis—he, Rawls, would release complainant from all further liability on said *fi. fa.*

The defendants filed their answers which do not admit any of the material allegations of the bill.

On the trial of the case the following evidence was introduced by complainant:

JOSEPH CARUTHERS testified: That he was Sheriff or Deputy Sheriff of Pulaski county, in the years 1840-1-2-3-4; and frequently during those years held *fi. fas.* against St. George; does not remember ever to have made any other return on them than satisfaction. St. George, in 1842, had about forty negroes and about twenty-three hundred acres of land. The country was then suffering under a great financial crisis, and if St. George's negroes had been forced to sell, he thinks they would not have averaged more than \$300 each, and his lands would have brought in specie funds about \$1000 dollars an acre. St. George was largely indebted to James Everitt and others, and if his property had been sold at that time for specie funds at Sheriff's sale, does not think the same would have paid his debts. Nothing could have been made out of Collier and Bracewell in the Spring of 1842; does not remember in what year Bracewell left Pulaski county; witness, as Sheriff, used to make money out of when required, as long as he staid there, and never would have made an entry of *nulla bona*. St. George left at his death some thirty-five or forty thousand dollars worth of property, most of which was inherited by the Colliers,

Molloyneaux vs. Collier.

complainant included. St. George's property, if sold in 1842 for other than specie funds, would have brought a good deal more than \$25,000. His credit was then good and witness considered him responsible.

Complainant next put in evidence exemplifications of executions and mortgages against St. George, as follows:

A *fi. fa.* issued on a judgment obtained in July, 1840, in favor of the Bank of Hawkinsville for the principal sum of \$16,025.25, upon which were various credits from April 5, 1842, to November 8, 1850, showing satisfaction in full. A mortgage to the Bank of Hawkinsville, dated February 18, 1841, to secure three notes due on the first days of January 1842-3-4 respectively, and being for the aggregate amount of about \$6,730, the mortgage covering all of St. George's land and negroes. A *fi. fa.* in favor of Molyneaux against Collier and Bracewell, and St. George security on appeal issued on a judgment obtained in July, 1840, for principal \$9,306.10. A *fi. fa.* in favor of Washburn and Lewis against the firm of Collier, Jelks & Co., composed of Bryan W. Collier, J. O. Jelks, and Edward St. George, issued on a judgment obtained in July, 1840, for principal sum of \$349.51. A *fi. fa.* against said last named parties, and issued on a judgment obtained at the same time for the principal sum of 13 dollars and 25 cents. A *fi. fa.* in favor of Miles Fields against said firm of Collier, Jelks & Co., on a judgment obtained in January 1841, for principal sum of \$116.28. A *fi. fa.* in favor of Silas Bronson against Collier, Bracewell, and St. George, on a judgment obtained in July, 1841, for principal sum of \$579.26. A *fi. fa.* against the firm of Collier, Bracewell & Co., and St. George, security, on appeal on a judgment obtained in July, 1841, for principal sum of \$824.81. A *fi. fa.* against Bracewell as principal, and St. George as security on a judgment obtained in July, 1841, for principal sum of \$558.54. A *fi. fa.* against Collier, Bracewell & Co., and St. George as security on a judgment obtained in July, 1841, for principal sum of \$514.82. A *fi. fa.* against Collier, Bracewell & Co., and St. George security on a judgment obtained in July, 1841, for the principal sum of \$1,855.86. A *fi. fa.* against Collier and Bracewell, and St. George as security, on a judgment obtained in July, 1841, for the principal sum of

Molyneaux vs. Collier.

A fi. fa. against Collier, Bracewell, and St. George, judgment obtained in July, 1841, for principal sum of

A fi. fa. against Collier, Jelks, and St. George, on judgment obtained in April, 1842, for principal sum of

A fi. fa. against Collier and Bracewell, and St. George, on a judgment obtained in April, 1842, for principal sum of \$412.91. A fi. fa. against Jelks, Bracewell and St. George, on a judgment obtained in October, 1841, for principal sum of \$416.

Manuscript from the execution docket of Pulaski county, that the above named fi. fas. for the principal sums of \$340.51, \$116.28, \$324.80, were satisfied in full in April, 1842; and the fi. fas. for the principal sums of \$1,324.85, were satisfied in full in January and February, 1844.

Defendant also put in evidence the record of fi. fas. against Collier, Bracewell and George W. Collier, amounting to several hundred dollars issued on judgments obtained in 1841--

COLLIER testified: That he understood from John Rawls that he controlled the fi. fa. in favor of Molyneaux, Bracewell, and St. George, during the years 1841 and 1842, when Jonathan Davis was in Hawkinsville

Fall Term, 1841, of Pulaski Superior Court, or any Term thereafter, at which time a conversation took place between said Davis and said John Rawls, in which said Rawls testified that he was there to have George W. Collier released from the Molyneaux fi. fa., and pointed out to him certain negroes of Bracewell. John Rawls testified that, by virtue of a contract between him, Defendant, and George W. Collier, said Collier was to be or had been released by his paying one-third of said fi. fa. Witness also testified that he said the same thing at Albany, prior to the conference referred to. George W. Collier was worth but little at the time referred to; does not know whether he was solvent or not. The firm of Collier, Bracewell, and St. George, was solvent, if the individual property of each was taken into consideration.

Witness also testified, in answer to a second set of questions, that he was present when John Rawls, Collier, Jonathan Davis, Harrison Jones, James Green and Green Tinsley, were together in Albany; a

Molyneaux vs. Collier.

credit of \$2,000 was then paid on the Molyneaux *fi. fa.*, in a note made by said Jones as a final settlement of George W. Collier's part of said *fi. fa.* Rawls then agreed to release said Collier, and saying he would take the *fi. fa.* to Pulaski county and make the balance of it out of the other parties. This was prior to the conversation testified to in Hawkinsville. The payment that was made in Albany was on the occasion of the purchase by Harrison Jones from Jonathan Davis of certain negroes which Davis had bought of Collier, it being admitted that the negroes were liable to the Molyneaux *fi. fa.*

Complainant then offered Jonathan Davis as a witness. Defendants objected on the ground that he was interested in the result of the suit, and in support of their objection, showed the Court that said Davis had filed a bill to enjoin the collection of the Molyneaux *fi. fa.* out of certain lands and negroes, upon which it had been levied, and which land and negroes said Davis had bought of Collier, the complainant. It was also shown that Davis had claimed the land levied on, and that the claim case was still pending; also that Davis had given an injunction bond on filing said bill conditioned for the payment to said Molyneaux of the eventual condemnation money and costs, in the event said injunction and bill were not sustained. And further, the order of the Court dismissing said bill was produced and shown.

The Court overruled the objection made as to the competency of Davis, it appearing that complainant had given bond with security to save Davis harmless from the effect of any decree that may be rendered in this suit, and to protect him against the lien of said *fi. fa.*, and complainant offering to deposit the costs in the clerk's office accruing in said claim case.

Complainant also offered to give a bond to cover all damages and costs that might be recovered against Davis in the claim case, which proposition was not accepted by defendants, and no such bond was given by complainant or required by the Court.

Jonathan Davis was then put on the stand, and testified relative to many material points in the case.

Peter E. Love testified, that Bracewell had possession of property in 1842, consisting of two slaves and a small plantation, which he claimed as his own; thinks the two negroes

Mollyneaux vs. Collier.

orth \$1,200. Bracewell had other negroes in his possession at that time, which he claimed as the property of his estate about \$4,000. He carried all these negroes, except, off with him when he removed from Pulaski county.

Stow testified relative to the ownership of the stock Bank of Hawkinsville. His testimony shows that in 1842 owned 442 shares in that Bank.

Mollyneaux fi. fas., with the entries thereon, was then in evidence.

Warren testified, that in 1841 or '42, after complaining his property to Jonathan Davis, he, complainant, considered insolvent. Complainant here closed.

Defendants introduced the following Evidence :

Caruthers testified, that St. George died in 1850, and left an estate worth \$45,000, one-fourth of which was inherited by complainant. St. George was sold in 1841-2-3. He owned forty or fifty negroes and about a thousand acres of land at that time. Witness was acquainted with St. George; his condition in 1844 was about the same as in 1842; does not know the exact amount of indebtedness during those years, but does not suppose he was any time more than \$25,000. Thinks if his property had been sold at that time, it would have paid his debts. Prentiss held the largest claim against him. Does not know the amount for which St. George was sued, but the sum is large.

Anderson testified, that he was intimately acquainted with St. George eight or ten years prior to his death; was acquainted, to some extent, with his pecuniary affairs in 1843, and thinks he owned about forty negroes and about sixteen hundred and two thousand acres of land; was acquainted with him solvent at that time, but greatly embarrassed.

Witness frequently says, if his creditors pushed him they would break him up. He left an estate worth about \$40,000 at the time of his death. Witness thinks he heard St. George say, at the time, that he would have to pay for the two negroes, Collier & Jelks and Collier & Bracewell, thirty or forty dollars. James Everett held the largest claim against him. Witness thinks if his creditors had pushed him they would have broke him.

Mollyneaux vs. Collier.

Daniel Matthews testified, that he got the Molyneaux fi. fa. from complainant in September, 1843, and delivered it to John Rawls. Complainant was then acting as Deputy Sheriff. In a conversation which occurred at the time, complainant stated that he did not think Rawls would sell his property, but would give him time to raise the money. Rawls held another claim against complainant, he thinks it was a fi. fa. The conversation had reference to all the claims that Rawls held or controlled against complainant.

Daniel Matthews was re-examined and testified, that in 1843, he called on complainant to get the Molyneaux fi. fa. and a fi. fa. in favor of one Wilcox against Collier & Bracewell. Witness got those fi. fas. for Rawls, who wished to raise money on them from Bracewell's property. In a conversation at the time with complainant, he said that Mr. Rawls would at least give further time to pay the fi. fas., if he failed to make the Sheriff of Pulaski responsible for the negroes Bracewell run off to Florida.

A. H. Hansell testified, that he had a conversation with complainant, in which he stated that he was desirous of settling the Molyneaux fi. fa. by turning over lands which he said were worth the amount of the debt, and wished witness to get an order passed authorizing the administrator of Rawls to take the lands in settlement. Witness was acquainted with the condition of Bracewell and St. George in 1842. Bracewell was insolvent; St. George was a good deal involved, but owned property to the amount of thirty or thirty-five thousand dollars, besides a life interest in about thirty negroes. Witness thinks the oldest lien against him was the Molyneaux fi. fa., and states that there would have been no difficulty of collecting the fi. fa. out of St. George. At the time of the conversation with complainant, witness was the Attorney for the estate of Rawls. He states that the Bank of Hawkinsville held mortgages on St. George's property, the exact amount of which he does not know, but thinks fifteen to eighteen thousand dollars. It was understood that St. George was to work his negroes and land, and pay every year as much as he could; and witness thinks he did reduce his indebtedness very rapidly.

The testimony of Edward St. George, taken in September, 1848, was then read. He states that some ten years prior to that time, complainant owned a plantation and some

Molynaux vs. Collier.

twenty-five or thirty negroes; and witness thinks he can state with safety since he has known him, that Bracewell owned ten or twelve negroes and a part of a plantation in 1841 and 42. Witness had a conversation with Jonathan Davis in 1843, or 1844, in which Davis told him that if he failed to arrange the Molynaux fi. fa., that witness was safe because he fi. fa. was older than the title which he, Davis, had from Collier to the lands in Baker county. In no conversation which he ever had with Collier and Davis, did either of them pretend that Collier was discharged from liability on said fi. fa., but Collier always spoke of being liable to pay the whole of it.

Green Tinsley testified, that he was present at Albany at the time Jonathan Davis sold to Harrison Jones some negroes previously bought by Davis from complainant. The transaction took place early in the year 1842; does not think Thomas Collier was present, but Jonathan Davis, Harrison Jones, John Rawls, and James J. Mayo, were present.—There was this difficulty in the way of the purchase of the negroes by Jones: Rawls had placed in the hands of witness Sheriff, the Molynaux fi. fa.; Jones refused to buy the negroes, unless Rawls would release them from the lien of said fi. fa.; Davis or Jones, or perhaps both of them, agreed to give a note for \$2,000, to be paid thereafter, provided Rawls would release the negroes from said lien, so that Jones could get a good title. This Rawls agreed to do, and the note was executed. Rawls did not agree to release complainant from liability on the fi. fa.; the agreement related only to the release of the particular negroes bought by Jones from Davis. In 1842, complainant had property consisting of land and negroes, but cannot state the quantity or value. Complainant was also present at the time referred to, and assented to, or did not dissent from, the agreement that was made.

A letter from Jonathan Davis to Rawls was then read, dated February 22, 1842, in which he excuses himself for not having called on Rawls at Hawkinsville, speaks of the hard times and asks Rawls' indulgence and refers to the Bracewell land having been advertised for sale, and asks Rawls to put up and have the money applied to the Molynaux fi. fa.

A letter from complainant to Rawls was then read, dated

Mollyneaux vs. Collier.

22d February, 1843, in which he promises to pay \$600 as soon as the river got high enough to allow cotton to be shipped, and says he expected to pay about one-half of his debts that winter, and hoped Rawls would give him indulgence for the balance. He refers to the levy made on the Bracwell land, and expresses the hope that Rawls will run up the land and protect him as far as he could.

A bill of sale from complainant to Jonathan Davis, dated February 23d, 1841, was then read in evidence, conveying for the sum of \$8,360, twenty negroes besides horses, mules, cattle, &c.

A deed from complainant to Davis, dated February 23d, 1841, was put in evidence, conveying a number of lots of land in Baker county for the alleged consideration of \$11,375 00.

The bill filed by Jonathan Davis, enjoining Molyneaux *fi. fa.*, already referred to, was then read to the Jury.

The defendant then proposed to read the depositions of Jonathan Davis, taken by commission, for the purpose of impeaching his statements made on the stand. Objection being made, the Court ruled out all of said depositions, except those parts which had been read over to Davis and to which his attention had been called whilst he was on the stand.

Samuel T. Bailey testified, that he had a conversation with Jonathan Davis prior to Rawls' death, and he thinks it was in 1848, in which Davis said he had come to Hawkinsville to make an arrangement about Collier's debt, and wanted to employ witness as attorney at law for Collier, to protect the property, he, Davis, had bought from Collier from the Molyneaux *fi. fa.*, said property being subject to that *fi. fa.* The ground on which he desired witness to resist the collection of said *fi. fa.* out of Collier, was that Collier was released because Rawls failed to have the *fi. fa.* levied on Bracwell's property when Davis had pointed out the same; Rawls then agreeing to make such a levy. Davis said nothing whatever about Rawls having agreed to release Collier. Witness afterwards named to Collier what he would charge him; Collier declined to give the price, and there the matter ended. Witness was never employed in the case neither by Collier or Davis.

James J. Mayo was then sworn by complainant in rebut-

Molyneux vs. Collier.

and testified that on the day Rawls released the negroes at by Jones from Davis, Rawls asked witness if the entry of complainant not included in the release was sufficient to pay off the Molyneux fi. fa. Witness asked Rawls if it was the oldest fi. fa. against Collier. Rawls replied it was, and witness then told him there was a plenty of entry left. The release of said negroes made by Rawls was in writing. Negotiations between the parties going on all day—the difficulty being how much of the proceeds of said sale Rawls should get on his fi. fa. It was agreed that \$2,000 of the sale should be paid over to

As well as witness remembers, the \$2,000 was paid in a draft to Jonathan Davis on Savannah, which received by Rawls and credited on the fi. fa. at that time. Then agreed to collect \$2,000 out of each of the defendants, and to look to complainant only for what then remain due, which it was estimated would be from five thousand dollars. The parties present at this session were: Rawls, Davis, Jones, G. W. Collier, Tinsley and, he thinks, Thomas Collier.

Evidence in the case here closed, and the Jury having returned a verdict for complainant, counsel for defendants asked for a new trial on the following grounds:

Because the Court erred in admitting the transcript of execution docket of Pulaski county, of certain fi. fas., and of entries purporting to have been made by the Clerk having certified that the originals were not in his office.

Because the Court erred in admitting in evidence the John Rawls, for the use of the Bank of Hawkins-Collier & Bracewell, with the entry of "no proper person, it appearing from the record that Collier was not made a party to said suit, and was not a citizen of the county when the said entry was made.

Because the Court erred in admitting the transcript of execution docket from Baker county—the objection

the same as that to the transcript from Pulaski.

Because the Court erred in admitting the evidence of Collier, it being shown that he had a fi. fa. against Molyneux of a junior date to the Molyneux fi. fa., and interested in defeating said last named fi. fa.

Mollyneaux vs. Collier.

5th. Because the Court erred in allowing Jonathan Davis to testify.

6th. Because the Court erred in rejecting the depositions Jonathan Davis offered.

7th. Because the Jury found against that part of the charge in which the Court told the Jury that if Rawls never made any contract to release Collier, then complainant cannot recover. And, again, if the Jury believe such a contract was made because Collier induced Rawls to believe that defendants to said *fi. fa.* were insolvent and not able to pay it in full, when, in fact, they were solvent, then said contract was void for fraud. And again, that, if the Jury believe that Rawls agreed to get one-third of the debt out of Bracewell, another third out of St. George, and leave only one-third for Collier to pay, this would not relieve Collier from liability for the whole debt—such agreement not being binding for want of consideration, that is, if the Jury shall further believe that there was no contract to release Collier, based upon the insolvency of the defendants to the *fi. fa.*, or that such contract was fraudulent.

8th. Because the Court erred in giving the following charges to the Jury:

That the answers of defendants upon hearsay, or when they deny any knowledge respecting the allegations of the bill are not evidence to be overcome.

That the Jury must reconcile all the evidence in the case, so as to let each witness speak the truth, if possible.

That the letters of Collier and Davis, and the statements of Collier to Hansell and others, are evidence only to prove or disprove the contract set up in the bill, and if the Jury believe, after carefully looking into all the evidence, that the contract was made, then the complainant will be entitled to a verdict.

That if the Jury believe from the evidence, that Rawls agreed with George W. Collier in consideration of the personal labor and services of said Collier to be applied in payment of the one-third part of said *fi. fa.*, the said Collier was to be discharged from all liability on said *fi. fa.*, and the said Collier, in consideration of said contract, did enter upon the performance of that contract, and performed the same by paying \$1,000 in money and \$2,000 in a note on Jones

Mollyneux vs. Collier.

that said payment was made and accepted in full of Collier's liability, and in discharge of said contract, then the contract was executed and complainant is entitled to a verdict.

that said original contract alleged for Collier to apply the proceeds of his yearly labor until he paid one-third of said debt, when he was to be discharged, was legal and binding on Rawls, if the Jury believe that under it Rawls took the possibility of a benefit from the embarrassed condition of the parties, or the better to secure his younger mortgages and judgments.

that if the Jury believe from the evidence, that a contract was made in Albany, in 1842, between Collier, Davis, and Rawls, by which Rawls took and accepted in full satisfaction of Collier's liability, \$2,000 in Harrison Jones' note, then the said *fi. fa.* is satisfied as to the debt.

that if Rawls received and accepted what was paid by Paul of Collier's liability on the *fi. fa.*, then the same contract was executed, and this is true whether the parties were insolvent or good and though a less sum was paid.

that declarations and statements made in ignorance of legal rights do not bind him, and when explained, are worthless; and if Collier wrote the letter and made admissions under the apprehension that the contract would not protect him, then if you believe the same has been proven, the admissions are explained.

because the Jury found against the charge of the defendant in the substance as follows:

complainant must prove the allegations in his bill to the satisfaction of the Jury.

In order to determine what was the contract between the parties, the Jury will look at the evidence as to what was the contract when it was consummated; all previous offers, &c., are rejected in the final contract. Again, that if the Jury find there was such a contract as stated in the bill, and it was legal and beneficial to Collier and detrimental to Rawls, it is void for want of consideration; and further, that the verdict was a charge of the Court respecting the credit to be given to the testimony of witnesses where there is a conflict of testimony.

Mollyneux vs. Collier.

11th. Because the Court erred in refusing to charge the following request of defendant's counsel: "In weighing the credit to which a witness is entitled, his connection with the parties, his interest in the suit, the length of time about which he testifies, his manner of testifying, his hesitation and equivocation, the circumstances of his testifying, and all the circumstances are to be taken into the consideration of the Jury."

12th. Because the finding was against law, against equity, and against the weight of evidence.

The Court overruled the motion for a new trial on all the grounds taken, and counsel for defendant excepted.

SLAUGHTER & SCARBOROUGH, for plaintiffs in error.

CLARK and HAWKINS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Several of the grounds taken in the Bill of Exceptions, were waived upon the argument, and, therefore, will not be noticed in the decision.

1. Was Jonathan Davis a competent witness? The Mollyneux execution was levied upon land and negroes as the property of George W. Collier, and claimed by Jonathan Davis. The claim to the negroes was finally withdrawn by him, but the claim to the land is still pending and undisposed of. A judgment in this case, setting aside the execution, upon the ground that it was satisfied, could be used by Jonathan Davis to defeat the execution upon the claim trial, and he would be left, of course, to hold the land in dispute, consequently he is directly interested. He would be gainer by the event of this suit. The record in this case, could be used by him in the trial of the claim. By both of the tests, therefore, prescribed by the Rules of Evidence, he is excluded for incompetency by reason of his interest.

2. Does a bond of indemnity, to protect him from all liability of whatsoever kind, restore him to competency?

It must be conceded there is a conflict of authority upon this point, but the weight of authority as well as the better opinion is against the restoration to competency by this mode

cedure. Who does not know and understand that it is to extinguish former or present liability rather than to stand and look to the bond of any body for indemnity? Truly in this ever changing world, who can calculate certainty upon the future for re-imbursement? The old adage, that a bird in the hand, &c., applies. The conclusion, then, is, that it was error to allow Mr. Collier to testify in this case.

The witness, Jonathan Davis, had been previously examined by commission upon interrogatories. Counsel proposed to contradict his present statements by his written depositions. The Court allowed this to be done, so far as the answers of the witness had been called to his answers in the interrogatories, but no further. In this, we think there is no error. 7 Ga. Rep. 467; 14 *ib.* 85—185. It was a mistake for favor to the witness to call his attention to any part of his previous examination, and he cannot complain that attention was turned to a part only.

The Court, amongst other things, charged the Jury to compare the letters of Collier and Davis, and the statements and admissions of Collier to Hansell and others, were evidence to prove or disprove the contract set up in the bill, and they were to believe, after carefully looking to all the testimony, that the contract was made, then the complainants were entitled to a verdict. That if the Jury believed that the contract was made with Collier the contract set up in the bill was proved, that the same had been performed by the payment of \$2,000 in cash by Collier, and \$2,000 in Jones' note, and that payment was accepted in full satisfaction and discharge of Collier's undertaking, the contract was executed and the complainants must so find. And further, that if the Jury believed that the contract set up was made in Albany, in that Rawls accepted \$2,000 in Jones' note, set off by Collier in full of the execution, in that event the contract was satisfied, and that, notwithstanding a less sum was paid, and whether the defendants in the *ex. fa.* were insolvent. That if Collier wrote the letter to Jones and made the admissions which he did, under the bill, that the contract would not protect him, the bill was explained, provided the contract was proven. This has been three times already before this Court. 2; 8 T. R. Cobb's Rep., 406, and 17 Geo. Rep.

Mollyneaux vs. Collier.

46, and from first to last, from the beginning to the end the contract between Collier and Rawls has been sustained upon the assumption of the insolvency of the execution debtors. It could have been enforced upon no other ground. Without this element, it was a void contract, having no consideration to support it. This is the corner-stone, the foundation, "*the mud-sill*," upon which the original bill, with all the amendments, rest. And now to ignore this principle is, in effect, to abandon the case.

On no occasion before this, has the nature of the \$2,000 payment been fully disclosed by the proof. What was the real character of that transaction? Jones bought of Davis, who held at one time the title to all of Collier's property, negroes worth \$8,000, upon the whole of which the lien of Rawls' judgment attached. The judgment is older than the sale by Collier to Davis. Rawls consents, *gratuitously*, to release to Jones, the purchaser, his lien upon this property, provided \$2,000 of the purchase money is paid over to him. What consideration, I ask, was there for this release which was not made to Collier, but to Jones? None can be suggested. And yet this is relied on as an extinguishment of the judgment, a satisfaction of the execution; and the Jury are instructed that they may so find. It is preposterous Rawls did not so understand it, neither did Collier. Nor would Rawls be bound by it if he did. And it is a perversion of the transaction to attempt to give it such a coloring. If it were so, why did Rawls express his fears to a witness at the time, that he had released his lien upon too much of Collier's property? Why did Collier urge Rawls to take the execution home with him for the purpose of coercing payment out of St. George and Bracewell, his co-defendants? What was it to him what became of the balance, provided he was discharged? Why his subsequent offers to settle the *et. fa.*, if it was his understanding that he had paid his part of it in full, and was to be looked to no further?

The pretence is, that he was released by this payment of \$2,000. Why did it never occur to him to say so, instead of showing by his subsequent conduct and declarations, that the very contrary was true?

But the charge to the Jury is, that if the contract was proven, Collier was absolved, and that these after admissions were to be explained upon the hypothesis, that they were

in ignorance of his rights. But what is there in the
 any to justify this supposition? Who knew better
 Collier did, the object and intention of that Albany
 action? His after conduct is proof that he, at least,
 also understand that arrangement. Instead of war-
 the inference that his subsequent promises were made
 vance of his rights, his subsequent promises demon-
 that such was not the intent and meaning of that
 payment, and that he knew it.

orbear, ordinarily, to express any opinion upon the
 , notwithstanding it is made a point in the bill of ex-
 , when the case is sent back for a rehearing. But in
 , we feel that justice demands that we should not
 our opinion upon the facts.

manifest that these execution debtors were not insol-
 the original contract was made between Rawls and
 which, it is conceded, never was executed. All that
 d is the substitution of another mode of performance.
 t property of St. George & Collier, at that time, was
 0,000 at a law valuation, while their aggregate in-
 ss amounted only to \$45,000. After the payment
 left which Collier owed, except the balance due upon
 eux execution, Davis turned over to Collier five
 five or six hundred dollars and a settlement of land
 any. Collier, it is alleged in the argument, is now
 m \$100,000 to \$125,000, or upwards. St. George
 d the whole of his liabilities, and left to his widow,
 air, \$40,000, and she being the mother of the Col-
 e \$10,000 of St. George's estate was cast, at her
 on her son George W. Collier. These facts are
 d not denied, whether they appear in the record or
 was not read, and which I have not the time to
 had nothing else to do, between this and the next
 ie Court. They no doubt approximate to accuracy.
 -iginal agreement was entered into either by the
 concealment of the parties (which I disclaim m-
 hem,) or an honest mistake or misapprehension as
 uniary condition of the defendants—which is most
 fact—would not a Court of Equity relieve against
 ract? And is it just or equitable that an honest
 d fail of collection under these circumstances?
 report with honor or conscience to let it go unpaid,

Brady vs. McKee & Roberts.

when there are so much means that should be applied to its discharge? Can the complainants invoke the aid of Chancery to shield them from its payment?

I have done my duty. I leave it to others to do theirs—as I doubt not they will—as to them may seem right and proper. I shall be content, let the result be as it may.

BRADY vs. MCKEE & ROBERTS.

Certain carriages and harness were bought in Columbus of McKee & Roberts, whether by Livingston or Brady, there is some conflict in the testimony. Livingston gave his note in payment, with a stipulation upon its face that the note of Dr. Wardlaw might be substituted for his, Livingston's. The decided weight of proof is, that Livingston made the trade, and that the vendors looked to him for payment. McKee & Roberts sue Brady in assumpsit for the purchase money: *Held*—1. That the Court erred in refusing to charge as requested, that the fact that the vendors took the note of Livingston at the time of the sale for the purchase money, was *prima facie* evidence that the credit was given to him; and in adding a qualification that had nothing to do with the legal principle contained in the request, namely “provided the note was absolute upon its face, and nothing further to be done by the parties thereto; the only condition being the stipulation that Livingston might substitute Dr. Wardlaw's note for his. 2., In charging that the payment by a promissory note on an insolvent person was no payment at all, the proof showing that the payment was not by Brady, the defendant, in Livingston's note, but by Livingston in his own note: *Held*, That the remedy, if there was any against Brady, was to charge him upon the fraud in the transaction, and not upon the contract of sale.

Assumpsit, from Sumter county. Tried before Judge ALLEN, at October Term, 1859.

The defendants in error, McKee & Roberts, brought their action of assumpsit against the plaintiff in error to recover the value of a carriage, and buggy and harness which they

Brady vs. McKee & Roberts.

fore sold and delivered to the latter, under the circumstance and upon the agreement indicated in the evidence introduced by the plaintiff in the Court below, and which is as:

S Mariner testified, in substance, that he was in employment of plaintiffs, who were engaged in the car-busness in Columbus, Ga.; he recollects that W. W. on, of Chattahoochee county, and Wright Brady, of county, called at plaintiff's place of business on or the 14th day of November, 1856; their business was to fine carriages—one Berlin coach, or rockaway, no-top buggy, and harness for the same; Brady to said carriages and harness; Livingston had no in the trade, except to obtain the consent of Mr. Roake a note, or certain notes, from Brady; Brady trade, and was to furnish Livingston with certain in the sale of negroes to be handed to Roberts; Liv- produced Brady to Roberts, and represented him very wealthy, and responsible; the credit was given in notes, as before stated; Roberts was acquainted with Livingston's circumstances, and knew him not to be, Roberts requested the notes of Brady, and Brady they should be forthcoming within ten days through; Brady took the carriages away.

Fernoy testified, that he saw Wright Brady in Col- on, on the 14th day of November, 1856; he told had bought a carriage and buggy, with harness, e & Roberts for the sum of \$900; Brady came to able at the time stated and told witness to send a es and driver to McKee & Roberts, and put them each and to hitch on a new buggy, which was done; e horses and driver from witness, and paid him and drove them off; the carriage, buggy and har- worth \$900; Brady got them from McKee & Ro- then asked witness if he, Brady, did not pay too em? witness replied, "he did not;" was present conversation was going on between Roberts, one of McKee & Roberts, and Wright Brady, in March, David Young and a Mr. Wilcher were present; tion was about a coach and harness, and a no- and harness, and Wingfield Livingston; it was at

Brady vs. McKee & Roberts.

McKee & Roberts' office, in Columbus, Georgia; Brady asked Roberts if the arrangement as made by Livingston would satisfy him? Roberts said it would; this was admitted by both at that time, and this is all that was admitted.

Plaintiffs here rested their case.

The defendant then introduced the following evidence:

Jordan Wilcher testified, that he was in Columbus about the first of April, 1857, and present at a conversation that took place between plaintiff and defendants about a carriage and buggy the defendant had got from plaintiff; Dr. Young was also present; Mr. Roberts said that Livingston had made the bargain and arrangement with him for the goods; that Livingston was to give plaintiff his note therefor; that Livingston had said that he had expected to sell some negroes to a man named Wardlaw, and if he did, he would pay him in Wardlaw's notes; Roberts said that Livingston had given plaintiffs his note for the purchase money in accordance with the agreement made by Roberts and Livingston; no one was to endorse Livingston's note.

Roberts farther stated to the defendant that before the defendant selected the carriage and buggy, that defendant asked him if the arrangement had been made for the carriage and buggy, and that he said to him that satisfactory arrangements had been made for the purchase of the same. Roberts also stated, that he did not inform, or had not informed, the defendant that he had charged the carriage and buggy to him at the time; Roberts stated he had charged the articles to defendant with the knowledge of defendant; that the defendant was not present at the time the bargain was made by Livingston; witness says he went with defendant, and at his request, to see Roberts, and to "witness" what Roberts said about the matter.

Dr. Young testified, that he was present at the same conversation, and stated what he heard Roberts say, which was the same, in substance, as the foregoing, except that he gave a more detailed statement of what was said by Roberts. He also stated he was requested by Brady to witness the conversation with Roberts.

Thomas McBride testified, that Livingston bought a buggy from plaintiff in 1854, and gave his own note for it; in 1856 Livingston also bought a fine rockaway and harness

Brady vs. McKee & Roberts.

tiff on a credit; he paid for the buggy; does not whether he paid for the rockaway or not; Livingston ten miles from Columbus, and from plaintiff's long acquaintance with him, they must know something of his capacity to pay.

McGough and George McGough testified, that they considered Livingston good at one time, but in 1856 and considered him doubtful; were informed that the he had belonged to his wife; witnesses are dry merchants; sold Livingston what goods he wanted in on credit, and have continued to do so up to January 1858: considered him doubtful, but they and others sold him goods on credit; they knew nothing to show that he had a good credit.

L. Booker testified, that he gave Livingston credit in part of 1856 on his own account, but in the latter part of the year found the property he had belonged to his wife after that charged goods sold to his wife's trustee; information was received from Livingston himself that he was the wife's trustee; does not know the extent of his credit to Livingston; witness again commenced crediting him on his own account and individually.

James testified, that he had known A. S. Mariner for many years; knew him in the employ of plaintiffs in 1855, as clerk, salesman, collector, &c.; that he was well known with the general character which he bore in Columbus in 1855 and '56 for truth and veracity, and would on such knowledge, believe him on his oath in a Court of law; that said Mariner had absconded and run away from Columbus in 1856, between Christmas day and New Year.

John and Sarah Frederick testified to the same effect.

John Terry testified, that Mariner's character in Columbus in 1856 and '57 for truth and veracity was very bad; that he was an unreliable man; might believe him under some circumstances, but would not attach as much importance to his oath as to that of a man of unquestionable veracity.

John Kay testified, that in the summer of 1856 Livingston was indebted to Brady about \$1,000; that Brady once insisted on having paid; that Livingston made several propositions of payment; among others, offered

 Brady vs. McKee & Roberts.

to sell him a negro man; that he finally proposed to Brady that he had a good credit in Columbus, Ga., and would buy him a carriage, as he had heard his wife say she wanted one; a few days after the carriage transaction, Abe, the negro man, ran away and came to Sumter, and that soon after, Livingston and his father got into litigation about him and other negroes; witness knew Brady had no interest in Abe: he had an interest once, but had sold some time ago.

John R. Worrill testified, that he saw Roberts in Columbus in 1857; made his acquaintance then, and spoke to him of this case; Roberts said that Livingston had come to him alone one morning; told him he was owing Brady; that Brady wanted a carriage and buggy; that he wanted to pay Brady what he owed him; that he had a negro man who he contracted to be sold to Dr. Wardlaw; that he wished to get the articles with the understanding he should pay for them in Wardlaw's note; to that plaintiffs agreed, if Livingston would endorse Wardlaw's note; that afterwards, Livingston brought to the shop Brady and his wife, who, after inquiring if satisfactory arrangements had been made, selected the articles and took them off.

Wesley McGrady testified, that he knew Livingston in 1855 and '56; he then had a good credit; had seen him buy goods in Columbus on credit.

Defendant then put in evidence the note, of which the following is a copy, drawn from plaintiffs under notice:

“\$900

“COLUMBUS, GA., 14th Nov., 1856.

“On demand, I promise to pay McKee & Roberts, or bearer, Nine Hundred Dollars, with interest. Witness my hand and seal, to be exchanged for note Dr. Wardlaw endorsed.

(Signed)

“W. W. LIVINGSTON.”

In rebuttal, plaintiffs then proved by Seaborn Jones, John A. Jones, A. S. Rutherford, F. M. Brooks, R. S. Mott, L. J. Moses and some sixteen other witnesses, that they were well acquainted with A. S. Mariner, and that they would readily believe him on his oath in a Court of Justice; by a number of these, that they would believe him as readily as they would any one. They also proved by several witnesses that Mariner did not run away, but told them when and

where he was going, and that he afterwards returned and fulfilled a contract for work with the plaintiffs, staying some time with them before he returned home.

Hines Holt testified, that in March, 1857, he thinks it was, Brady, Roberts and one or two others were in his office in conversation about the sale of a carriage and buggy; Roberts asserted that they had been sold and charged to Brady, and that Brady had received them and carried them away; Brady asserted that they had been sold to Livingston, who was alone bound to pay for them; there was a long discussion or wrangle between them, each standing to his own position; witness cannot detail all that each said.

H. T. Hall testified, that he had had dealings and accounts for years with plaintiffs, and always found them correct in their dealings.

(Verny and Holt had before testified to the same effect.)

James McBride testified, that he was trustee for Livingston's wife, witness' sister, from 1854 to 1857; all her property was then in him as trustee; knew of no property in November, 1856, which would have been subject to his debts; he was indebted at that time, but cannot state the amount; he bought a buggy of plaintiffs in 1854, but bought it for his family, and it was considered as part of the trust property; witness gave the money, as trustee, to him to pay plaintiffs therefor, which he did, taking their receipt in witness' name as such trustee.

The Jury found for the plaintiffs.

Whereupon, the defendant moved for a new trial, on the following grounds:

- 1st. That the Jury found contrary to Law.
- 2d. That the Jury found contrary to evidence.
- 3d. That the Jury found contrary to the weight of the evidence.

4th That the Court erred in refusing to charge the Jury as requested by defendant in the words requested to-wit: "That upon the sale of property, the taking by the vendor of a promissory note of a third person, made at the time payable to the vendor, is *prima facie* at least, evidence that the credit was given to that person." And instead thereof, in charging the words, with the addition: "provided that the note is absolute upon its face, and nothing further to be done by the parties thereto."

Brady vs. McKee & Roberts.

5th. Because the Court erred in charging the Jury in this case that payment by a promissory note on an insolvent person is no payment at all.

6th. Because the Court erred in charging the Jury that if the Jury believe, from the evidence, that Livingston and Brady are brothers-in-Law; that Livingston was indebted to Brady \$900 or a \$1,000, and that Livingston was insolvent or in doubtful pecuniary circumstances, and that Livingston and Brady went to Columbus in view of Livingston's buying the carriages and harness from plaintiffs for Brady, that Livingston went to plaintiffs and made a false statement, and thereby obtained the property; that the property went into Brady's use and possession, the fraud of Livingston vitiates the sale, and Brady being the beneficiary of the fraud, he is liable for the value of said goods so sold.

7th. That if the Jury believe, from the evidence, that Brady and Livingston are brothers-in-law; that Livingston was insolvent; that Brady knew it, and that Livingston and Brady agreed that if Livingston would pay him in carriages, that in pursuance of said agreement, Brady and Livingston were in Columbus together when the goods were bought; that Livingston went to plaintiff's carriage repository and told plaintiff, Roberts, that he owed Brady, and that he and Brady had three negroes jointly in Chattahoochee county, in which Brady (?) was interested, and were about to sell them to Dr. Wardlaw, and agreed to pay them in Wardlaw's notes; that Livingston then went and brought Brady to plaintiffs; that Brady inquired if the arrangement was made, this is evidence from which they may infer Brady's assent to what Livingston represented to plaintiff, and, at all events, that if the Jury believe the above to have been proven, Brady is liable to pay for the goods.

8. Because there was error in this—that after the Jury had agreed upon a verdict, they returned a verdict as follows: "We, the Jury, find for the plaintiffs nine hundred dollars, and the plaintiff deliver to defendant the note on Livingston." Which verdict was read by plaintiffs' counsel in open Court, and the Court compelled the Jury to retire and find for defendant, or plaintiff with correction.

The Court overruled the motion on all the grounds, and defendant excepted.

Brady vs. McKee & Roberts.

BRADY & HAWKINS, for plaintiff in error.

SCARBOROUGH, for defendant.

The Court.—LUMPKIN, J., delivering the opinion.

In this case rested upon the evidence alone, we should not reverse the verdict and judgment. But there are, in our opinion, errors in Law, in this case, which ought to be corrected, before a just result can be arrived at.

The Court should have given to the Jury the instructions asked for in the first request, without qualification. The request was, that McKee and Roberts having given a note of Livingston in payment of the carriages, &c., it was *prima facie* evidence that he gave credit and looked to them for payment.

The Court, in response, said, "Yes, provided the note is upon its face, and there is nothing further to be ascertained from the parties." Now, there is, it is true, a stipulation on the face of the Livingston note, but what is it? That Livingston should have the privilege of substituting Wardlaw's note in the place of his. What has to do with this? and how does it interfere with the operation of Law, suggested in the request?

The charge given, as well as the first request refused, with a qualification, is erroneous, namely, that "payment of a promissory note on an insolvent person, is no payment." Mr. Brady did not purchase and pay for the note with Livingston's note; on the contrary, Livingston gave the articles bought with his own note, and whether good or bad, what has Brady to do with that?

He is, Brady, if liable at all, is liable upon the contract, and not upon the fraud. To treat Livingston's contract as Brady's contract, is a total perversion of fact, as well as a misconception of the only remedy.

In the present form of proceeding, we think it unnecessary to enter upon an examination of the testimony.

Chappell vs. Hawkins.

CHAPPELL, Trustee, &c., vs. HAWKINS.

One, C., alleging himself to be trustee for S. L. and her nine children, petitioned the Judge of the Superior Court and alleged that one, S. H., an Attorney of that Court, had in his hands the sum of \$3,300. to which he, as trustee, claimed title. The attorney answered, &c. *Held*, That the petition was properly dismissed. The applicant, not averring that the attorney had collected or held the money as his agent or attorney, or by what right he claimed the money or possession thereof. That the remedy was by Bill in Equity.

Petition in Chancery, from Webster County. Decided by Judge KIDDOO, September Term, 1859.

Joseph Chappell, as trustee for Susan Lingo and her children, filed his petition, alleging that Samuel Hawkins, an attorney of said Court, had in his hands the sum of \$3,300, which belonged to petitioner's *cestui qui trusts*, and praying that said money be paid over to him accordingly.

The defendant answered that in June, 1859, the sum of money in question was paid to him by Charles J. Reynolds, with the understanding between Joseph J. Chappell and Littleberry L. Causey, that said fund should be disposed of, or paid over to one or the other of said parties—Chappell or Causey—as certain arbitrators by them chosen should determine. The time was set for the arbitration, but for some cause the arbitration was abandoned. The money was paid on a note held by Causey as agent or attorney in fact for Taliaferro Lingo.

Counsel for defendant, on the hearing, demurred and objected to the said proceedings; and the said demurrer was sustained by the Court, and the cause ordered to be dismissed. Counsel for petitioner excepted thereto and assigned the same as error.

W. A. HAWKINS, for plaintiff in error.

WORRILL and SMITH, *contra*.

By the Court.—LYON, J., delivering the opinion.

Pinkard vs. The State of Georgia.

application of the plaintiff in error was properly dis-
by the Court. The petition did not show that the
ant had the money in his hands as her attorney or her
or by what right she claimed title to the money or
session thereof.

ie facts stated by the defendant are true, as to his
—and it is not denied—and the money does in fact
to the plaintiff, or she has a *bona fide* claim or inter-
the same, her proper remedy is by Bill in Equity, in
ll the parties claiming an interest or title to the fund,
be brought before the Court, so that their respective
may be adjudicated and settled, and the defendant,
ut a stakeholder protected by the decree.

ient affirmed.

KARD vs. THE STATE OF GEORGIA.

ant who is complicated with others in the commission of a crime,
by the arresting officer, that he put him upon the pursuit by
sing a presumption of his own innocence.

cannot be compelled to accuse himself; but where this is neces-
full understanding of other statements which he has made, the
it to be withdrawn.

as previously agreed to participate in a crime, may repent.
not be present at the commission of an offence to constitute him

nt for Simple Larceny, in Muscogee Superior
ied before Judge Worrill, at November Term,

ntiff in error was indicted and found guilty of
ceny. He moved for a new trial on the follow-
:

Pinkard vs. The State of Georgia.

1st. Because the Court erred in refusing to allow counsel for defendant to ask one Heggy, a witness who had been sworn for the State, and who testified that he went upon information that negroes were in that part of town being stolen, who gave him the information, and at whose instance he went.

2d. Because the Court erred in refusing to allow counsel for defendant to ask one Ephraim Knowles, a witness who had been sworn for the State, and who testified to the conversation between Perry, Axon, Pinkard and Holcomb, about carrying off some negroes, what he, said Knowles, said himself at the time, and all he had to do with that transaction—the said Knowles refusing and the Court stating to him that, if the answer would criminate him, he need not answer.

3. Because the Court erred in refusing to charge the Jury as requested by the counsel for defendant in writing, that, if the Jury believe, from the evidence, that Perry and Axon had the negro woman in their possession which had been stolen from Brinsfield by them, and the defendant did agree to carry off the negro, he is not guilty of the offence charged in the indictment, but is guilty as accessory after the fact.

4th. Because the Court erred in refusing to charge the Jury as requested by the counsel for defendant in writing, that, if they, the Jury, believe from the evidence that Pinkard, the defendant, did agree with Perry and Axon to steal the negro woman belonging to Brinsfield, yet, if they believe that Pinckard abandoned the purpose, and went off and did not participate in the crime, then the Jury must find the defendant not guilty.

5th. Because the verdict of the Jury was contrary to Law, contrary to the evidence, contrary to the charge of the Court, contrary to, and strongly and decidedly against, the weight of the evidence, and without evidence to support it.

This motion was refused by the Court, and defendant's counsel excepted.

BLANFORD & CRAWFORD, and B. F. REESE, for plaintiff in error

WM. D. ELAM, *contra*.

the Court.—LUMPKIN, J., delivering the opinion.

express no opinion as to the refusal of the Court to defendant's counsel to ask the witness Heggy, who im the information that there were stolen negroes in a place in town. If the defendant wished to show that self put the officer on the pursuit of this property, us establish his innocence, or want of participation in ceny, it was competent, unquestionably, to interrogate that point.

he Court was right in protecting Knowles from being led, contrary to the Common Law as well as the Con- n of the country, from accusing himself. But then art should have ruled out the whole of the conversa- which the witness participated.

is certainly true, that if the defendant had no parti- in the theft until after the negroes were stolen, he accessory after the fact only. If, however, the fel- concocted between the parties previously, he would, case, be a principal. One need not be present when is committed to constitute him a principal.

e think the fourth charge should have been given.— as well as the Gospel allows a place of repentance. twithstanding the accused may at one time agreed ngaged in this crime, yet, if he afterwards changed and abandoned that intention, he is not guilty. re was proof in the case to warrant a charge to that

GILL vs. WILKINSON.

If a Sheriff permit a negro, he has in possession under levy, to go at large, and such negro escapes, the Sheriff cannot re-imburse himself for the costs and expenses of recaption out of the proceeds of the sale.

Rule against Sheriff, from Lee County. Decided by Judge PERKINS, March Term, 1860.

James W. Wilkinson, being the plaintiff in a *fi. fa.* against James W. Cross for the principal sum of \$285.86, moved a Rule against William C. Gill, Sheriff of said county, calling on him to shew cause why he should not pay over on said *fi. fa.* the sum of \$180.00, being a balance in his hands after satisfying other *fi. fas.* which brought the fund in Court.

In reply to the Rule, the Sheriff answered: That there was a balance in his hands, as stated in the Rule, raised from the sale of defendant, Cross', negro woman, Rhena; that at the time he received said negro, the jail of the county was insecure and unsafe, and was not sufficient to safely keep said negro, and that it continued in that condition; that the weather was extremely cold, and he took said negro to his home and kept her there, as he thought humanity required. Whilst the negro was thus situated, said Wilkinson placed an attachment in his favor against said Cross in his hands, which he also levied on said slave; that both before and after the levy, the said Wilkinson well knew the manner in which the slave was kept, and consented thereto; that afterwards the woman was stolen from his possession, and that he was subjected to great trouble, expense and loss of time in going to various places in this State and in Alabama, to find and retake her, which he did, and thereafter brought her to sale, as stated. He states, the expense of her recaption amounted to the said balance in his hands, and claims the right to apply the same to his own reimbursement.

He further answered, that there was an older *fi. fa.* controlled by himself, to which he had the right to apply the balance of the fund on hand.

After argument of counsel, the Court ordered the Rule to

de absolute, and counsel for the plaintiff in error ex-

TKINS, for plaintiff in error.

REN & FLOYD, *contra*.

the Court.—LYON, J., delivering the opinion.

I agree with the Court below, that there was not the reason for allowing the Sheriff to retain the balance in his hands, after payment of executions from the sale of negroes, for the reimbursement of himself for his expenses of himself and his company in following and retaking the negro that had escaped from his custody. It was the duty of the Sheriff, after he had levied, to secure the negro as to prevent her escape. If the jailer failed to do so, he should have adopted some other security; by permitting her to go at large, he took the risk of her escape, and the losses arising therefrom must be borne by him. As he sets up in his answers, that he has in his hands the execution of an older or prior lien to that of Wilkerson's attachment lien, we, in affirming the Judgment, do not part of his answer to be inquired of by the Court, shall appear that the *fi. fa.* the Sheriff claims to be a *Cheatem & Co. vs. James W. Cross*, is a subsisting unpaid one of prior lien to that of the attachment of James W. Wilkinson, that in such case the Court should require the amount due, or such execution be first paid out of the fund in the Sheriff's hands, and the balance, if any, to be paid on the attachment.

It is affirmed.

Hull vs. Tommy.

HULL vs. TOMMY.

The damages rendered for a frivolous appeal, held to be excessive under the circumstances of this case.

Assumpsit, in Muscogee Superior Court. Decision by Judge WOBRIIL, at November Term, 1859.

Tommy sued Hull on a promissory note for \$3,300, to which suit Hull entered an appearance and informed his counsel of his defence to said action.

At the Common Law trial, plaintiff had a verdict for the amount of the note with interest and cost. Hull appealed and the cause coming up for trial, no counsel appeared or was present, for Hull, and counsel for plaintiff submitted his note to the Jury, and claimed damages for a frivolous appeal. The Jury, under the charge of the Court, found for the plaintiff the sum of \$3,300, principal with interest and cost, and twenty per cent. on the principal sum as damages for a frivolous appeal.

Defendant, afterwards and during the same term of the Court, moved to set aside the verdict, and for a new trial, on the grounds that he had employed counsel who were absent at the time the case was called on the appeal, but which absence was without his consent or fault; that he had informed his counsel of his defence, and relied entirely upon them to conduct it, and to attend to the case; and, further, that plaintiff had found no special damage sustained by reason of said appeal, &c.

R. J. Moses, of the firm of Moses & Lawes, made affidavit that his firm had been employed by Mr. Hull to appear and defend said action; that they were advised of Mr. Hull's defence and thought it good, to the extent of two or three hundred dollars. Dont remember how or under what circumstances the verdict at Common Law was rendered; advised an appeal. If present when the case was called on the appeal, did not hear it. Was probably absent, as it is impossible for an Attorney during the five or six weeks that the Court usually sits in Muscogee county, to be present all the time, without a great neglect and sacrifice of other business and interests.

Hull vs. Tommy.

Court, after argument, refused the motion to open aside the verdict and Judgment, and counsel for defendant excepted.

. MOSES, for the plaintiff in error.

. NEWTON, *contra*.

per Court.—STEPHENS, J., delivering the opinion.

appellant was absent, and his counsel was absent, the case was tried, though generally present during the sitting of the Court in that county. It is not the case that the Court refusing to prosecute his appeal, or by doing it exposing its frivolousness. The most the Jury could say, that he had *failed* to prosecute it. The failure must have been caused by accident or even by distressing calamity, or by forgetfulness, or by negligence, and not by consciousness of having no defence. The case did not present itself to the Jury as calling for punitive damages, but the actual damage resulting from the delay of a term could not have been any approximation to the amount awarded, which the Jury found. They went almost to the utmost limit of the Law for the most aggravated case, no especial damage was shown; the interest on the money all the while accumulating, and the delay had been months. Under these circumstances, we think, the damages awarded were excessive.

judgment reversed.

Grace et al. vs. Rowell et al.

GRACE, et. al., vs. ROWELL, et. al.

When a decree is rendered on a bill filed by two complainants, one of whom was dead at and before the filing of that bill or rendition of the decree, that fact only vacates the decree as to the deceased complainant.

In Equity, from Baker Superior Court. Decision by Judge ALLEN, at November Term, 1859.

Willoughby W. Grace, executor of William Neves, deceased, and Robert W. Wiley, administrator *de bonis non* of James C. Neves, deceased, filed their bill of service, alleging that heretofore, a Bill in Equity had been filed in the name of William Neves and James C. Neves, to the April Term, 1853, of Baker Superior Court, against William Scott and Thomas Beall, administrators of William F. Scott, and George W. and Lawrence G. Rowell, executors of Richard Rowell, charging them with having taken possession of the whole estate of John Neves and Catharine Neves, of which estate said William and James C. Neves claimed one undivided half, &c.; and the prayer of which bill was for discovery, relief, and *ne exeat*. That said bill having been sanctioned, the defendants therein filed a demurrer thereto, at April Term, 1853, on certain grounds specified, and that the Court sustained the demurrer and dismissed said bill. It is charged that the decree of the Court sustaining the demurrer and dismissing said bill was null and void: for that, at the time said bill was filed, and before, to-wit, in the year 1857, the said James C. Neves, one of the complainants, had departed this life, intestate, leaving a widow; and that at the time of filing said bill in his name, and of dismissing said bill, and during all the time said proceedings were pending, said intestate was dead, and there was no representative on his estate, complainants asked that the decree had on said demurrer may be reviewed and reversed.

To this bill of review the defendants demurred at the May Term, 1855, of Baker Superior Court, Judge Perkins presiding, on two grounds:

1. That there was no error of law in the said decree, shown by said bill.

2. Nor any such new matter of which the complainants in the bill could not have noticed at the time of decree.

Grace et al. vs. Rowell et al.

demurrer by agreement was transferred and plead
Judge Perkins at the June Term of Dougherty Super-
ior, when after argument had, the Judge pronounced
wining judgment on the demurrer.

upon it is considered, ordered and adjudged and de-
the Court that said demurrer be overruled, and
bill be sustained, on the ground that the decree
be reviewed, having been rendered; and the bill on
was founded having been filed, while James C.
ie of the pretended complainants, was dead, without
sentation. The Court, deeming this ground insuf-
dispose of the demurrer, makes no decision upon
point raised in the cause; and it is further ordered
adants plead, answer or demur, not demurring
or before the first day of the next term of Baker
Court."

her steps were taken by either party affecting the
il the November Term, 1859, of Baker Superior
Then the cause came up for hearing, and counsel
ants admitted the facts charged in the bill, that
Neves, one of the complainants in the original bill
at the filing thereof, and at the rendition of the
rein. Whereupon counsel for complainant in the
ew moved the Court:

l bill of review be sustained, and that said decree
the original bill on demurrer be reversed, annulled
le as null and void; and that said original bill be
on the docket; and that said original bill be, on
solicitor for complainants, and hereby is dismiss-
prejudice, and that complainant here be re-instal-
itted to all their rights lost by said decree on
said original bill as full and effectually as if no
and proceedings had even been read.

t, on hearing, refused the motion, holding that
was valid and binding upon the said complainant,
es, but was void and may be set aside as to
eves.

usual of the Court to grant the motion so made,
omplainants excepted,

BENNING, for plaintiff in error.

& CLARK, *contra*.

Grace et al. vs. Rowell et al.

By the Court.—LYON, J., delivering the opinion.

Were the complainants entitled to the motion to the extent made in the Court below? We hold that they were not. If the demurrer to the bill of review had been overruled, on the ground taken therein, that there was no error in law in the decree, then the complainants would, unquestionably, have been entitled to their motion; for it is a well settled rule of equity practice, that "when a bill is filed to review a decree for *error in law*, apparent on its face, and a demurrer to such bill presents an issue of *law only* for the judgment of the Court, if the demurrer be overruled the effect is, to set aside and open the decree"—*Guerry vs. Perryman*, 12th Geo. Rep., p 18: *Caney vs. Giles*, 10th Geo. Rep., p 22.—The demurrer was neither sustained or overruled upon that ground by the judgment of the Court on the demurrer, but the Court overruled the demurrer, only, on the fact contained in the bill—that is, the death of James C. Neves, and expressly declined to pass on the other grounds as to the error of law; in such case, that is the judgment of the Court overruling the demurrer on matter of facts contained in the bill of review, and on which the equity of the bill rests, does not reverse and vacate the original decree.—*Guerry vs. Perryman*, 12th Geo. Rep., p 14.

The complainants did not put their right, to have this motion allowed by the Court, on the ground, that there was error of law apparent on the face of the decree, that question was not made or considered by the Court below, now argued before us. But the right to have the motion granted, was put entirely upon the admitted fact, that James C. Neves, one of the complainants in the original bill, was dead, at and before the filing of that bill, and his name was unauthorizedly in that bill. So understanding the motion, as well as the decision of the Court below, so we decide in this case, leaving the other question, made by the bill, that there was error of law in the decree, as the judgment on demurrer did, an open question, to be followed up by the parties or not, as they may think proper; not that we desire to avoid it, but because it has not been made, argued or passed upon by the Court below.

1. Then what is the effect upon the decree on the demurrer to the original bill complained of, of the fact, that at an

the filing of the bill, James C. Neves was dead? We say that the effect is only to vacate the decree as to James C. Neves, and not as to William Neves. Why should it have any other effect? William Neves brought the bill; he had no fault in Court; he lost none of his rights by reason of the death of his co-complainant. If the demurrer should be set aside to him, the effect will be to give him another day in Court to have the same matter re-adjudicated; it would be to allow him to take advantage of his own wrong, to the injury of the defendant. It was not necessary, that is, not indispensable, that James C. Neves, or his representative, should be joined with him in the suit.

In the case of *Fedlie vs. Dill*, 3d *Kelly*, p 104, was relied upon for adjudication of this point. We do not think it is, and could not enforce it in this case as well as all others to which it applies; for a decision of this Court once made by opinion stand and be enforced, though I do not think the preamble of that case should be extended beyond its limits.

That was a judgment at law against defendants who were brought into Court; they did not voluntarily come in. Error was the act of the plaintiff, not theirs. Here, the error is the act of the party who seeks to take advantage of the error. This is a proceeding in Equity where the Courts are not bound by the strict rules of Law, but will grant relief on the principles of right, without regard to the strict form. If the decree had been in favor of complainant, and he taken a benefit by it, on a motion to set aside the decree for irregularity, the Court would have allowed him to stand where he seeks to avoid it on that account, and do no more. To that extent the Court below was correct in granting the motion, and that was as much as he was entitled to have. Such is the effect of the decision.—*Newman vs. Rowell*, 57th R., p 578, and that was a proceeding at law.

It is affirmed.

Morgan vs. Ely et al.

MORGAN vs. ELY, et al.

The penalty imposed by our Statute for arresting a debtor, after he has been discharged from imprisonment under our laws in favor of insolvent debtors, applies only to arrests under process from this State, and not to arrests under process from another State, and within another State.

Debt in Quitman Superior Court. Decision by Judge PERKINS, at December Term, 1859.

Morgan sued Algernon S. and Howell T. Ely, for causing him to be arrested on a Bail process after he had taken the insolvent debtor's oath, they having had notice of his application to take said oath, and their debt being in existence at that time.

On the trial, plaintiff showed, by an exemplification of the record, that, having been arrested on a *ca. sa.*, he had applied to the Inferior Court of Randolph county, to be allowed to take the benefit of the insolvent debtor's Act, of which application he notified A. S. Ely & Co.; and that, at July Term, 1857, he was permitted by said Court to take the oath prescribed by that Act. Plaintiff then introduced a copy of a Bail Writ, in favor of A. S. Ely & Co., against him, issued at Eufaula, Alabama, January 19, 1858, by one Jack Hardeman, J. P., founded on an affidavit made by H. T. Ely, one of said firm, a copy of which affidavit was also introduced in evidence. The testimony of Jack Hardeman, taken by commission, was then read. He proved the making of the Bail affidavit by H. T. Ely, and the issuing of the Bail Writ, and its delivery, by said Ely, to Thomas Robinson, a deputy Sheriff. He also testified, that after the Bail Writ was issued, an arrangement was made, by which the debt claimed by Ely from Morgan, was settled. He says he was a Justice of the Peace when he issued the Writ authorized to take cognizance of such matters by the Laws of Alabama.

Plaintiff then read the evidence of Thomas Robinson. He says he arrested plaintiff on the 19th of January, 1858, by virtue of the Bail Writ in favor of A. S. Ely & Co. The arrest was made at Eufaula, Alabama; H. T. Ely being present and instructing him to make the arrest. He was not

Morgan vs. Ely et al.

ed with A. S. Ely, and does not know where he was arrested was made. He further says that the matter ed.

estimony of James H. Weaver, Secretary of State tate of Alabama, was then read. He stated that rdeman was a Justice of the Peace of that State, missioned on the 19th day of January, 1858, and a certified copy of his commission.

f then introduced H. T. Ely, one of the defend- proved by him that defendants had notice of plain- cation to take the insolvent debtor's oath in Ran- erior Court, and that their debt against plaintiff, sh they caused his arrest, was in 'existence and them at the time he took said oath, and had been them all the time. He further testified, that plain- l in Randolph county at the time he took the oath, ued to reside there until he was cut off into Quit- y, where he now resides.

intiff closed, and the Court, on motion of defend- sel, passed an order non-suiting the case. This now assigned as error.

IS & DOUGLASS, for plaintiff in error.

DRILL, *contra*.

urt.—STEPHENS, J., delivering the opinion.

no hesitation in holding that the penalty imposed ite for arresting a debtor after he has been dis- n imprisonment under our law for the relief of btors, applies only to arrests under process of nd not to arrests within another State, under -from. There was no intention to interfere with ctions in their manner of enforcing the payment : the object was to regulate and restrain the the creditor within this State.

affirmed.

Bethune vs. Dougherty.

BETHUNE vs. DOUGHERTY.

1. Where a Bill-holder sues the assignee of a Bank upon its notes, and so plea of *non est factum* is filed, the plaintiff need not prove the execution of the Bills.
2. The Chattahoochee Railroad & Banking Company made an assignment, in 1841, to Van Leonard, W. P. Yonge, and John Bethune, of its effects, to collect and pay its debts. There is no evidence that Van Leonard ever accepted the trust. There is proof that the other two did. In December, 1843, the Legislature passed an Act, in which it is recited that an assignment had been made by said Railroad & Banking Company, to John Bethune, and confirming and making valid said assignment for all purposes, both in Law and Equity; and declaring that said assignee might sue and be sued in his said character of assignee for any demand due to and from said Banking institution. *Held*, That said Act is Constitutional and valid, and that the subsequent renunciation by John Bethune, in December, 1844, of this legislative ratification of his appointment by the Bank, does not discharge him from liability.
3. Where a Common Law remedy is given to enforce an equitable right, to which the Statute of Limitations cannot be pleaded, it cannot be pleaded to the proceeding at Law.

Assumpsit, in Muscogee Superior Court. Tried before Judge WORRILL, at November Term, 1859.

This was an action of Assumpsit by William Dougherty, as the owner and holder of the bills of the Chattahoochee Railroad & Banking Company, against John Bethune, whom the plaintiff alleged to be the assignee of said Bank, and liable as such assignee, to be sued by the bill-holders, under the provisions of the Act of 1843.

Similar actions by the same plaintiff, against the same defendants, had been brought and tried, and the judgments in which had been brought to this Court upon writs of error. The decisions pronounced by this Court, in those cases, will be found in 7th *Geo. Rep.* p 90, and in 21st *Geo. Rep.* p 257, to which the professional reader is referred for a more full statement of the facts of this case.

The defendant pleaded, amongst other things, the general issue, Statute of Limitations, and Non-acceptance of the appointment of assignee or receiver, made by the Legislature by Act of 1843.

The only additional fact as evidence on the trial in this

case, was the introduction, in evidence, by plaintiff, of an answer made by defendant to the Bill in Chancery, in which he admitted that he had, under the appointment of assignee made by the deed of assignment made by the Bank, in 1841, with Wm. P. Yonge, executed a deed conveying a certain house and lot in the city of Columbus, belonging to said Bank, but that Yonge received the proceeds of sale.

Upon the trial, plaintiff offered to read in evidence the bills of the Bank, the foundation of his action, amounting to \$6,945 00. Defendant objected to these bills being received or read as evidence, until their execution was proved. The Court overruled the objection, and allowed the bills to go to the Jury, without proof of their execution. To this decision defendant excepted.

Plaintiff then read the answer of the defendant to the Bill in Chancery, above referred to. He further read, in evidence, the deed of assignment made by the Bank, conveying to Van Leonard and William P. Yonge, certain property therein described, and constituting and nominating them the assignees of said Bank. This did bear date, July 1841.

Defendant read to the Jury his letter to Governor Crawford, dated December 12, 1844, declining and refusing to act under, or accept the appointment of assignee of said Bank, made by Act of the General Assembly, December, 1843, and which letter will be found in 21 of *Georgia Reports*.

Defendant then read the judgment of forfeiture against said Bank, rendered June 13, 1843, in the Superior Court of Muscogee county.

The testimony being closed, counsel for defendant requested the Court to charge the Jury as follows, to-wit:

1st. That if Bethune never accepted the appointment of assignee, under the Act of 1843, then the plaintiff could not recover.

2d. That if Bethune and Yonge accepted the trusts, under the deed executed by the Bank, in 1841, then plaintiff can not recover.

3d. That if more than six years elapsed from the forfeiture of the Charter of the Bank to the commencement of this suit, then the plaintiff's cause is barred by the Statute of Limitations. A similar request was made to charge as to the lapse of four years.

The Court refused to charge as requested by defendant,

Bethune vs. Dougherty.

but charged the Jury that if the Chattahoochee Railroad & Banking Company executed the deed of assignment, read in evidence, to Leonard, Yonge, and Bethune, and Yonge and Bethune accepted the trust therein created, then it was competent and within the power of the Legislature to pass an Act authorizing the plaintiff, or other creditors of the Bank, to sue Bethune alone, and that it was not necessary, to enable plaintiff to recover, to show that Bethune accepted under the Act of 1843, provided he accepted under the deed of assignment executed by the Bank; and if Bethune and Yonge accepted under said deed, then plaintiff could recover against Bethune in this action, even though he expressly refused to accept the duties and liabilities imposed by the Act of 1843. To which charge and refusal to charge, counsel for plaintiff excepted.

The Jury found for the plaintiff six thousand nine hundred and forty-five dollars, to be levied of the goods and chattels, lands and tenements of the Chattahoochee Railroad & Banking Company of Georgia, with interest and cost.

Whereupon, counsel for defendant tender their bill of exceptions, assigning as error the rulings, charge, and refusal to charge as above stated.

M. L. PATTERSON and B. Y. MARTIN, for plaintiff in error.

WILLIAM DOUGHERTY, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Was counsel for plaintiff bound to prove the execution of the Bills sued on, before they could be read to the Jury?

The suit was against the assignee of the Bank that purported to have issued these Bills. Was it not the duty of the defendant, under the judiciary Act of 1799, (to say nothing of the Act of 1856, passed for the purpose of dispensing with the proof, to have pleaded *non est factum* to the Bills? They were the foundation of the action; and failing to do this, the *factum* of the Bills will be preserved.

There was evidence sufficient to authorize the Jury to find that John Bethune and Wm. P. Yonge accepted the trust

Dougherty vs. Bethune.

the deed executed by the Bank in 1841. They cannot property under and by virtue of said appointment, and thereby estopped from denying their acceptance. Now of the Legislature, passed in 1843, does not propose port to interfere with this assignment made by the On the contrary, it expressly declares that the assignment made by the Chattahoochee Railroad & Banking y to John Bethune, conforming as it does to the Act General Assembly of 1842, and of record in the office of the Superior Court of Muscogee county, taken, held, and considered valid for all purposes, law and in equity. *Cobb's Digest*, 121.

suggested that here is the assertion of a solemn falsehood the General Assembly, that there is no such assignment from the Bank to Bethune. Whereas, the fact is a deed to John Bethune, but not to him only. eyance is to Van Leonard, and William P. Yonge at there is no evidence that Van Leonard ever accepted trust or acted under it, and while the contrary is Yonge at one time, to-wit, in August, 1841, when and himself made the deed to Gibson, may he not drawn from the trust prior to December, 1843? and he Legislature have had satisfactory evidence that withdrawn or renounced his trust? and are we not presume that it had? Can any one doubt but that ture ratification, in 1843, of these Bank assignments with the knowledge and by the consent of all the interest? As to Mr. Bethune, his letter to Governor, declining to act under the appointment of made by the Legislature, as he is pleased to consent not written until just twelve months after the 23. He never did refuse to act under the Bank, so far as we are informed by the evidence, and only assignment ever made, and the only appointment of himself as assignee, for the Legislature or attempted to do either.

Act recites, then, that the assignment was made to John Bethune, looking to the state of facts as they then existed. It may have stated what was substantially, and for legal purposes, true. And such, no doubt, is the fact that we are bound to believe it. And here is the error and misconception about the whole matter.

Dougherty vs. Bethune.

It is in treating of those assignments by the Banks, and the appointment of assignees under them, respectively, as the Act of the Legislature, instead of the act of the Banks.—The Legislature simply affirmed or confirmed their acts, and made provisions for more effectually carrying them out.

The Act of 1843, amongst other things, provided, that the assignees should have power and authority to proceed forthwith to the settlement, collection, and payment of the debts due to and from said Banking institutions, “according (to what?) to the provisions of the said several deeds of assignment.” It further provided that said assignees should, upon motion to any Court in which suit is or may be pending, for or against said Banking institutions, and notice of said motion to all the parties to said suit served upon them personally, or upon their attorney at law of record, be made parties to said suits; and that they should have full power to sue and be sued in their said character as assignees for any demand due to and from said Banking institutions.

It was competent for the Legislature, surely, to do all this, and to substitute legal for equitable remedies for and against those assignees.

In *Dougherty vs. Bethune*, 7 Geo. Rep. 90, there was no proof that John Bethune had ever accepted the assignment made by the Bank, and the same defect in the proof existed in *Bethune vs. Dougherty*, 21 Geo. Rep. 257. In both of these cases, the proposition maintained by counsel, was that the Legislature could force Bethune to act as assignee, without his consent or against his will. But this Court adhered to its position, that the acceptance of the trust was necessary to be proven. That testimony is now supplied; and since the decision in those cases, so far from sustaining the plaintiff in error in this case, are authorities really on the other side.

Does the Statute of Limitations of four or six years, bar the plaintiff's right of recovery in this action? We think not, most clearly. But not for the reason assigned by counsel for the defendant in error.

He insists, that this Court has laid down the doctrine broadly, that the Statute does not apply to Bank Bills, and so it did. But that rule applied, perhaps, to Bank Bills which continued to circulate as currency. But the Bank Bills in this case, had ceased to circulate as currency. They had ceased to be taken in, and re-issued as currency.

Roe et al. vs. Doe et al.

But there is another, and to my mind a conclusive reason, why the Statute does not apply. This action is to enforce a trust. No remedy for this purpose exists at Common Law. But here, it is given by the Legislature. Were the Bill, older, in this case, to go into equity to enforce this trust, will it be pretended that the legal bar to plaintiff's claim could be interposed? Certainly not. Could the assignee of the Bank, who has been put in possession of the effects of the Bank to release those Bills, shield himself, under the Statute, from the performance of his trust? No one will seriously contend for this; and if he could not in equity, and the creditor has availed himself of a Common Law form, as he had a right to do, under the authority conferred upon him by the Legislature, shall he thereby be deprived of a right which could not be taken from him in equity? In other words, shall he be barred at Law, when he would not be in equity? We think not.

There are other considerations which might be suggested by way of reply to the plea of the Statute. But being satisfied with this, I shall forbear to adduce them, at least for the present.

ROE, casual ejector, and G. W. HAY, Administrator, *de bonis non*, of J. J. ALLEN, *vs.* DOE, *ex dem.* of JULIAN AYRES, *et al.*

The sale, by an Administrator, of land for which a suit is pending against him, is no reason why an administrator *de bonis non*, should not be made a party to the suit, after the death of the first administrator.

Ejectment and Motion to make parties, in Randolph Superior Court. Tried before Judge PERKINS, at May Term, 1860.

Roe et al. vs. Doe et al.

A suit was brought by defendants in error, against Jeremiah H. Allen, as administrator on the Estate of J. J. Allen, deceased, for the recovery of a certain lot of land. Pending this suit, the administrator, Allen, died. His death having been suggested of record; and *scire facias* having issued and been served on George W. Hay, as administrator *de bonis non* of J. J. Allen, deceased, to show cause why he should not be made a party defendant as such administrator *de bonis non*. The said Hay came before the Court, at said May Term, and objected to being made a party defendant, on the following grounds, viz:

Because the lot of land, the subject of dispute, is not the property of him, the said Hay, as administrator *de bonis non* of the estate of said J. J. Allen, deceased, but that said land had been sold and regularly disposed of, and fully administered upon by the former administrator of J. J. Allen, deceased.

The Court overruled the objection; ordered said Hay, administrator *de bonis non*, to be made a party defendant, and counsel for defendant excepted.

BEALL, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

This action was founded on a seizure of possession committed, and mesne profits appropriated by the intestate in his life time, with a continuation of the same wrongs by the administrator after the death of the intestate. If the action was properly brought against the administrator, it was right to preserve it against the administrator *de bonis non*. The ground of objection to the making of this party, is rather a reason for it than against it, for it shows that the estate had got the benefit of a full administration of the land, and the estate, therefore, through its proper representative, ought to respond to the true owner. As to the purchaser who bought the land *pendente lite*, he, of course, took it subject to the result of the litigation.

Judgment affirmed.

BROWN vs. RICKS.

Where rents, issues and profits, arising from trust property, have come into the hands of the trustee, during the life-time of the *cestui que trust*, and where unaccounted for at the time of his death, his administrator is entitled to demand an account and settlement of the trustee.

In Equity, from Clay County. Decided by Judge KID-
DOD, at Chambers, — day of —, 1859.

This Bill was filed by George W. Brown, as the administrator of James N. Toney, deceased, to compel Robert G. Ricks, the defendant in error, to account for and pay over to the plaintiff in error, as such administrator, the property and rents, issues and profits thereof, due the deceased at the time of his death, and which, it was alleged, were in the possession of said Ricks, as trustee of the said Toney, under the will of deceased's father.

The provisions of the Will of William Toney, deceased, the father of James N., so far as relates to the subject of this suit, are as follows:

Item 4. "I give and bequeath to my son, James N. Toney, of Clay county, Georgia, during his life, and to his lawful children, living or hereafter to be born, the following negro slaves," (naming some twenty negroes.) "I also will and give to said James N. Toney, and his children, four thousand and six hundred dollars in cash, and my stock in the South-Western Railroad, amounting to two thousand dollars; said cash and Railroad stock to be taken possession of by said James and children's trustees, and managed by them, and paying the interest and dividends to said James and children. On the death of James N. Toney, the whole of the property devised to him by this Will, is to go to and rest in his lawful children, or their representatives, in equal portions—making an equitable allowance for the support and education of the younger children. And all of the said property is to be taken into the possession and management of the lawful trustees of his children, to be held and managed for the support and education of them, and giving off to each his or her share, as they become of age or marry. Should James' wife,

Brown vs. Ricks.

Rhoda Ann, survive him, I wish a reasonable allowance paid her annually by the trustees for her support."

Item 8. "I will and direct that all my lands in Georgia, Alabama and elsewhere, except that given to brother John's wife and children, in item 6, be duly advertised and sold at public outcry, for one-third cash and the balance on one and two years' credit, or the whole on one and two years credit, with interest from date of sale in both cases, as my executor may deem best, to be well secured with deeds of trust, or otherwise, and the money arising from their sales, and all moneys due me from other sources, or which I may have in hand, not otherwise disposed of by this Will, be equally divided into three equal parts, and one-third be given to the wife and children of said Washington, one-third to said Eliza E. Ricks and children, and the other third to said James N. Toney and his children—all under the terms, qualifications, conditions, restrictions heretofore prescribed and repeated, touching legacies to the several persons or classes of persons."

Item 15. "I name and appoint Robert G. Ricks and such other person or persons as the proper Court may appoint, trustees for James N. Toney and children, to take and to hold the legal titles to all property given them by this Will. I direct that there always be two trustees for this purpose. During James' life, I wish him to work his land and negroes; but after his death, I wish the trustees to take charge, possession and management of the same for his children's benefit."

The Bill states that James N. Toney left at his death four children, who are still surviving, and that said deceased, at the time of his death, held the said property in joint tenancy with his said children, under and by virtue of said Will.—The rents, issues and profits of said property having gone into the hands of said Ricks, trustee, with the property itself, complainant filed his Bill, as the representative of the deceased, asking that said trustee should account to him for the rents, issues and profits of said property due deceased as life-tenant under said Will.

On demurrer, the Court dismissed the Bill for want of equity, and counsel for complainant excepted, and assigns the same as error.

& SIMS, for plaintiff in error.

LASS & DOUGLASS, *contra*.

e Court.—LUMPKIN, J., delivering the opinion.

ink this a plain case. The Bill alleges: The gift of property by Colonel William Toney in trust for the of his son, James N. Toney, during his life, and l children, living or thereafter to be born, after his That there were interests and profits accruing in erty, during the life-time of James N. Toney, which received by him, but which came into the hands of e—Robert G. Ricks—the defendant. That James r is dead; that the complainant has been duly ap- is administrator; and as such, he prays an account ment of the rents, issues and profits received by he Bill was demurred to and dismissed for want of

acts charged are true, why should not this account True, the administrator is entitled to nothing that ed since the death of his intestate. He claims t that score.

ggested that there are no debts due and owing by ed, James N. Toney. No such fact appears, how- the face of the Bill, nor otherwise, except by the in argument of the defendant's solicitor. By plea a special case should be stated. As the plead- the complainant is entitled to an account.

SHINE vs. REDWINE AND WIFE.

1. Where the purchase is made by a Trustee on his own account of the estate of the *cestui que trust*, although sold at public auction, it is the option of the *cestui que trust* to set aside the sale, whether *bona fide* made or not: Provided, the heirs make their election within a reasonable time.
2. If an administrator illegally sells the property of his intestate's estate, and becomes himself the purchaser, and the heirs elect, to rescind the sale, he will be desired to convey to them the property remaining in his hands unsold, and to account for that which he has disposed of by gift or resale, at the highest value.
3. The *ex parte* orders of the Ordinary are no protection to the administrator for his illegal acts.
4. If a man dies intestate, leaving his wife and daughter his only distributees, the husband of the widow is a competent witness to testify in a suit at the instance of the daughter and her husband against the administrator.

In Equity, in Twiggs Superior Court. Tried before Judge LAMAR, at September Term, 1859.

This was a Bill filed by the defendants in error against the plaintiff in error, making the following allegations:

That in 1837, Robert F. Glenn died intestate in Twiggs County, leaving his widow (now Mrs. Shadrach Ware) and the present wife of complainant Redwine, his only heirs at law; that he left a large estate, consisting of lands, negroes, stock, &c., of which Shine, in January, 1838, having qualified as Glenn's administrator, possessed himself; that Shine did not administer said estate in the manner pointed out by law, nor did he make legal or true returns of his actings and doings; that he caused the perishable property to be sold, and bought most of it himself, and caused at least six of the negroes to be sold, and returned them as bought by other persons, whilst, in truth, four of them, if not more, were bid off for said Shine himself, and taken by him; that said administrator has rendered no account of the lands, and has misappropriated the *choses in action* belonging to the estate; that several years subsequent to 1838, the said defendant, without any legal authority, caused the balance of the negroes to be sold, and so managed as to become himself the purchaser for a merely nominal price, making no returns of

es paid, nor of hire received during the years inter-
between Glenn's death and said sale; that complain-
wine's said wife was then a minor, and very young,
no power to secure or protect her rights, and being
under control of defendant until her marriage in
at defendant is still in possession of said estate,
y the negroes and their increase, which, with the
hire, &c., are worth \$50,000 or other large sum;
ccount of the concealment practiced by defendant,
nts are unable to discover the quantity, value or
of said estate, without resorting to defendant's
e.

amendment, complainants further allege: That if
of sale was ever procured by defendant, it was at
rned Term of the Court, and before notice of
to apply for such order had been advertised the
nired by Law; that said sale was not advertised as
y Law, but six of the negroes were sold on the day
order was granted, and returned by Shine as bought
arrison; when, in truth, five of the said negroes,
ere bid off for said Shine, and went at once into
ion; that until January, 1845, defendant held the
the negroes as the property of said estate, when
8 other negroes to be sold without giving any no-
ention to apply for an order to sell, or, in fact,
an order for that purpose—no order having been
sell any part of said estate since the order of
1838, which complainants claim was *functus*
the sale first had under it; that said sale was
ind void for the further reasons that the negroes
F by Henry Bunn for defendant, (although de-
rned them as bought by Bunn for himself,) and
or cash, and without notice, and at a time when
hought they would sell cheap—the creditors of
aving been previously paid off, and no division
sary; that complainant Redwine's wife had no
nd if a division had been necessary, a sale of
s was not requisite to make it; that on the 5th
1845, defendant procured the Court of Ord-
s an order, which, after reciting that he had
istered," and had legally published a citation
f dismission—no objection having been filed—

Shine vs. Redwine and Wife.

ordered the Clerk to grant letters of dismission, and to permit said Shine to retain money to pay the taxes of the estate for the year 1845; that said order of dismission was fraudulent and void, because notice of intention to apply for it was not published six months; no division had taken place; the estate had not been fully administered; no return even of said last-named sale was made until the day said order was granted, and no opportunity, therefore, had been given for parties interested to examine it.

The Bill prays that said orders and the sales under them be set aside, and that defendant be brought to a full settlement with complainants; that he be decreed a Trustee for complainants in respect to the property purchased by him, and be decreed to deliver up the negroes still in his possession, and to account for the present value of those he has disposed of with hire.

The defendant, in his answer, admits that he administered on the estate of said Glenn as stated; that Mrs. Redwine and her mother are the only heirs at law, and that the former was a minor up to the time of her marriage in 1856; denies that said Glenn died seized of any lands, and denies that he, defendant, has failed to account for the ~~choses in action~~, &c., of said estate. As to the negroes, the answer states that in May, 1838, defendant, after due and public notice, brought to sale six negroes of said estate, viz: Bill, Harriet, Lydia and child, Guilford and Henry; the sale was perfectly fair in all respects, and all the negroes were bid off by G. L. Harrison, except Harriet, who was bought by Glas McCrea; that defendant got his friend Harrison to run up said negroes to a higher figure than any one else would bid, and the prices paid were the highest market value at the time, to-wit: for Bill, aged 10 or 12 years, \$455; Lydia, aged about 30, and child, \$861; Guilford, aged 13 or 14, \$600; and Henry, aged 27 or 28 years, \$1,100; that defendant, not having means of his own to pay the debts of said estate, was compelled to sell Bill and Lydia and child to raise money for that purpose; made no profit on said sale; sold the other two at a loss; does not know whether said Guilford and Henry are now living or dead; that he paid Guilford the amount stated, and has had him ever since; that said Guilford is now worth \$1,000, and has ever been since 1838, \$90 or \$100 per annum; that he paid the price

Henry, who is growing old, and now worth \$600 or average hire since 1838 would reach \$125 per annum. The answer further states, that in January, 1845, it made sales as follows of negroes belonging to said plaintiff:

an old woman, 45 or 50, and her child Wiley, to \$300; Pool, a boy aged 10 or 11 years, also bid off by H. Bunn, at \$250; Henry, a boy aged 19 years, to Herring, (actual sale) \$400; Harriet, a girl aged 12 or 13 years, bid off by H. Bunn at \$299; Charlotte, a girl 9 years old, bid off by H. Bunn at \$365; Esther, a girl 12 or 13 years, bid off by H. Bunn at \$250; a boy aged 8 or 9 years, bid off by H. Bunn at \$250. In 1850 he gave Harriet, then worth \$500 or \$550, to Daniel W., and she, with her six or seven children, worth now about \$3,000, and but little, if anything, that Harriet and children constitute part of the estate of said Daniel W., who is dead; that in 1855 or 1856, he sold to his daughter, Mary Faulk, and she, with all children, is now worth \$1,500 or \$1,600, and her hire at this time; but her hire for seven years about \$30 per annum; that Charles is still in debt to defendant, and is worth \$1,000 and \$125 for hire, averaged \$50 per year for hire for thirteen years. Plaintiff denies that defendant bought any of said negroes under-value; says the prices were the highest he could get, and in all cases where he could get an advance sale, he charged himself with the advance; that he acted in good faith, doing his best to make the property worth its full value; that he procured the services of Henry Bunn to buy up the negroes for him to save the estate from being hard and property selling low; that having bought Pool and Charlotte at an advance of \$184, he charged himself with the advance, and made return accordingly to the Ordinary; that he offered Mary and Wiley at cost, but could not get it; says the sales were made under the order granted in 1838, all the negroes being sold in the latter year because defendant's heirs would not require it, and he desired to save the negroes for his daughter (deceased's widow) child (Mrs. Redwine); that another sale being

Shine vs. Redwine and Wife.

necessary to pay debts, he applied to the Court in 1845 for leave to sell, when one of the members of the Court announced from the Bench that a new order was unnecessary, and the previous order was then examined and found sufficient, and defendant acted under it; says he did make the returns of the sales, and of the hire of said negroes, and fully accounted for the proceeds of all the property, and is not in default to said estate one dollar; that as to advertising said sale, he was advised and believed that it was legal for an administrator to advertise in anticipation of an order of sale, and if he erred, it was an honest mistake, and did not injure any one; that as to the debts against said estate having been paid before said sale, it is so far from being true, that to save the property from sacrifice, he had to advance his own private funds to pay said debts, as his return will show; that as to the orders for sale of said property, if there was anything illegal, it was the act of the Court, and not of defendant, who gave orders for notices to be given according to Law, and believed then, and believes now, the Law was complied with; that as to their being granted at an adjourned term, the Court inquired of its Clerk respecting the regularity of the proceedings, notice, &c., who responded that all was fair, regular and right, and the Court, acting upon the information thus received, granted the order; that it is true the Court granted defendant final letters of dismission as stated in the Bill which defendant pleads in bar of complainants' suit; that as to the charge of fraud in obtaining said dismission, defendant applied to the Court from time to time for advice, and as to notices and all matters of form, followed the advice and direction of the Court—Lewis Solomon, the Clerk of said Court, a man justly entitled to confidence, reporting all correct, and defendant believing then and now that the Law was strictly complied with; there was no fraud or concealment whatever by defendant. Embodied in answer is the following statement of defendant's returns:

First return, including negro hire,.....	\$1602 67
Sale of negroes 1st Tuesday in May, 1838,.....	3671 00
Solvent notes and accounts,.....	178 00

\$5449 67

Paid out as per first return,.....	\$7151 34
------------------------------------	-----------

Balance due administrator,.....	\$1702 02
---------------------------------	-----------

Shine vs. Redwine and Wife.

high deduct, as per return May, 1840,.....	53 50
	<u>\$1648 52</u>
its as per return May 2d, 1841,.....	179 83
of 1844,.....	4 76
of 1842, embraced in return of 1844,.....	3 43
1843, " " " " " ".....	4 30
on \$1648.52, from May 28th, 1840, to January 1844,.....	528 73
on \$179.83, from May 2d, 1841 to 1845,.....	46 49
	<u>\$2416 06</u>
ons for receiving and paying out \$7151.20,....	357 56
	<u>\$2773 62</u>
of negroes January 7th, 1845, deducting ex- s.....	2355 89
istrator, January 7th, 1845,.....	417 73

swer prays a decree in favor of defendant for the
ce.

ndment to his answer, defendant states that all the
d off at the two sales by Harrison and Bunn were
him; that Mary, now 60 years old, is probably
0 to \$150, and has averaged \$50 for hire; her son
v 14 or 15 years old, is worth \$1,000 or \$1,200,
eraged for hire, for last five years, \$40 to \$65;
old to Robert Paul by defendant at a profit; Char-
old to A. McAllen by defendant, and now has 3
en; Harriet, with her two children, given by de-
his son, Daniel W., in 1850, then worth \$1100,
0) and she has had 5 children since, whose ages
7 down to 2 years, and they are worth \$1,550—
ly, by reason of recent rise in negroes, worth
0; that Esther and infant child were worth in
56, when given to defendant's daughter, about
er hire from 1845 to 1855 averaged \$70 or \$75;
ce had a child, and the family are now worth
arles is now about 21, and worth \$1,200—ave-
or 13 years, \$50—hire for present year, \$125;
e of 1845 was necessary, because the widow had
re, and the estate had to be closed up, and if
ything irregular about granting the orders, de-

SUPREME COURT OF GEORGIA.

Shiue vs. Redwine and Wife.

defendant did not know it; that the sale in 1838 was advertised sixty days in anticipation of an order allowing the same.

On the trial of the case, the Bill and Answers were read to the Jury, and complainants then introduced in evidence an exemplification from the Court of Ordinary of defendant's returns, which make return of the negroes bought for defendant at said two sales, as bid off and purchased by Harrison and Bunn respectively at the prices stated in defendant's answer.

Complainants then read in evidence the testimony of Shadrach Ware—defendant objecting, on the ground that Ware having married Glenn's widow, was interested. Ware testified: That he was in Marion (where the negroes were sold) on the day of sale, being 1st Tuesday in January, 1845, but did not attend the sale, because he did not think defendant was acting right; did not know the negroes until defendant bought them; that soon after the sale, defendant offered to sell him the negroes, but not thinking defendant was acting, or had acted, right, he refused to have anything to do with them; thinks the sale was for cash, which was calculated to deter persons from bidding—times being hard and money scarce even with men of property; does not think the negroes brought their full value; knows defendant sold two of them at a considerable profit; negroes sold a year previous at 100 per cent. more than Glenn's brought; witness never expressed to defendant any dissatisfaction at defendant's conduct until 7 or 8 years after said sale, when he told defendant the hire of the negroes would have paid the debts of said estate, and that a sale was unnecessary.

Robert Paul testified for complainants: That he bought of defendant, in 1845, at private sale, a negro named Pool at \$800; he is now worth \$1,500, and \$150 for hire; has averaged \$115 to \$120 for hire since 1845; that a negro woman of the description of Esther is now worth \$1,200; \$1,300, her oldest child \$400 to \$500, and her youngest \$200 to \$250; their average hire from 1845 till now would be about \$80 per annum; Harriet and children, as described in defendant's answer, are worth \$5,200, and she, for two years after 1845, has been worth for hire \$125 per year, and \$25 or \$30 per year for the intervening time; Charles is worth \$1,500, and his average hire per annum since 1845

Shine vs. Redwine and Wife.

about \$110; Wiley is worth \$1,500, and his average since 1845 would be \$115; Henry, being a black-worth now \$1,800, and \$200 per year for hire since Guilford is now worth \$1,200, and his hire since 1845 worth \$110 per year; that cash terms were calculated off bidders in 1845; witness wanted to buy the negroes, and did not because they were sold for

reemement of counsel was then read in evidence, that him, if present, would testify: That shortly after in 1845 he bought the negro girl Charlotte of debt \$400, which was then a fair price; that Charlotte had five children, and the family are now worth It was also agreed that no hire should be claimed between the sale of 1845 and her re-sale. complainants closed.

nt introduced in evidence an exemplification of record of the Court of Ordinary, touching his said tion, including the order of sale granted in 1838, ters of dismission granted in 1845, (complainants objection with the understanding that the charge rt might be asked respecting the legality of said

ants' counsel here agreed to make no issue on the the estate returned by defendant as insolvent.

Miller testified for defendant: That he acted as for defendant at both of said sales; the sales were uly, and the negroes brought fair prices.

unn testified for defendant: That he was at the : negroes were then low; those sold by defend-sale brought as much as negroes could then be cash; said sale was fair to the best of his know-was a large crowd present; defendant finding did not desire to purchase any of said negroes, a with a list of negroes and prices attached, and nness to buy said negroes in for him, (defendant) or less than those prices; witness agreed to do understanding that he was not to be charged roes or made liable for them; the property was time; specie funds were not required; negroes dd on credit at administrator's sales than for.

Shine vs. Redwine and Wife.

cash; cotton, in the Spring of 1845, was worth $4\frac{1}{2}$ to 6 cents—in 1844, from 9 to 10 cents.

Thomas Glover testified for defendant: That he was at the sale in 1845, and it was conducted fairly to the best of his knowledge; the negroes brought fair prices; witness was a bidder, but did not buy; would have bought if the negroes had sold low.

Lewis Solomon testified for defendant: That he was Clerk of the Court of Ordinary when letters of dismission were granted to defendant; the Court called on witness for the facts and witness, as Clerk, reported to the Court that defendant's citation had been published in terms of the Law, and that defendant's accounts were regular, and that he had fully administered the estate; the Court relied on the statements of witness, and did not personally examine the accounts; witness's rule was, when a return was made, to examine it and see that it was correct, and then to enter on the back thereof, "Officially examined and found correct," and report to the Court. Witness relied entirely on Mr. Shine's statements and returns under oath; took it for granted they were correct, and had no other evidence; the Court never examined a single return of Mr. Shine, and witness received them under the oath of Mr. Shine.

Gustavus McCrea testified for defendant: That he was at the sale in 1838; the sale was fairly conducted, so far as he saw or knew, and the negroes sold for fair prices.

Dr. Dupree testified for defendant: That he was a creditor of Glenn at the time of his (Glenn's) death, to the amount of \$3,000 or \$4,000. Witness looked closely into the condition of the estate, and was apprehensive of losing a part of his debt by reason of the insolvency of the estate.

Matthew Little testified: That cotton, in the Winter of 1845, sold for $4\frac{1}{2}$ cents and a year before for 10 cents.

The evidence having closed, the Jury returned a verdict in favor of complainants, for \$6,500, and decreed that the negroes Guilford, Henry, Mary, Wiley and Charles be sold, and half the proceeds paid to complainants.

Defendant moved for a new trial on the following grounds:

1st. Because the Court erred in admitting the testimony of Ware.

2d and 3d. Because the verdict is against Law and the evidence.

Shine vs. Redwine and Wife.

Because the damages decreed by the Jury are exces-

Because, in giving the following charge at defendant's in writing, to-wit: "It being in this case an admit- that defendant's intestate died in Twiggs County, ters of Administration on his estate were granted ie Court of Ordinary of Twiggs had jurisdiction to ave to applicant to sell the negroes, and if such leave ned, the order is good and valid in this case, unless by the fraud of defendant. It may have been ille- if the Court had jurisdiction of the case in this pro- such order, although illegal, is not therefore void." rt refused to give the same except in connection further charge in explanation thereof, to-wit: "In defendant to have legally procured such order for ell negroes, it was his du y to have published his n for such leave for the full period of four months, endant procured such order to be passed, knowing e that said application had not been published for eriod of four months, this is such a fraud as will d order." And the Court further charged, that adant could not petition legally for a citation to be ould a citation be issued until he had fully dis- e duties assigned to him, there is in the record no order for a citation. If you should believe from e that the citation was published before his re- completed, and that returns were made after the , and that no citation was published after his final e made, the publication, the Court charges you, and should you believe, in addition to the above the defendant had made any false returns, turning property purchased by others when he in fact, purchased by himself, and that he made eservations, or such were made by any one with- dge to the Court, and he knowingly availed it to procure an illegal order of discharge and curing the same before it could be lawfully grant- court, and this to the prejudice of complinants, charges you, that these circumstances would au- to set aside such order of discharge on the aud."

use the Court charged the Jury, that it was

Shine vs. Redwine and Wife.

necessary to the legality of an administrator's sale of negroes, that such sale should be advertised for sixty days after the passing of such order granting him leave to sell, and such advertisement could not be run contemporaneously with an application for leave to sell; and that a sale without such previous advertisement, however otherwise fair and for full value, is null and void.

7th. Because the Court refused to give the following charge as requested in writing: "An administrator in Georgia may buy at his own sale, he being the highest bidder, so the sale is otherwise legally conducted, if it be shown that the sale was fair, *bona fide*, and free from all fraud, and that the property so bought sold at the time for its full and fair value; and if the Jury shall so believe in this case, then complainants are entitled to no relief in this case by reason of such sale and purchase by the administrator."

8th. Because the Court refused to charge the following written request of defendant: "As to the negroes Pool and Charlotte—complainants making no controversy as to Bill, Lydia and child—if the Jury shall believe they were fairly and without fraud bought by defendant at his own sale, and that said negroes were thereafter fairly and *bona fide* re-sold to others, then defendant must account for the profits he made by his bargain in the purchase and re-sale of the negroes, and if the Jury shall believe from the evidence that the defendant has fairly accounted for and disbursed such profits in the administration of said estate, then complainants are entitled to no relief in the case made by their Bill touching the sale and purchase of said negroes." And because the Court, in lieu thereof, charged the Jury, "that the measure of damages and relief in such a case as to negroes bought by an administrator at his own sale and re-sold, is the value of negroes at the time of the trial, and hire from the time of such purchase up to date, subject to the deduction of the price paid by the administrator for the negroes, and interest thereon, which in this case would be 8 per cent.

9th. Because the Court refused to charge the following written request by defendant: "As to the negroes Harrie and Esther, if the Jury shall believe from the evidence that they were purchased by defendant at his own sale, and that said sale was otherwise a legal sale, and that, without an

Shine vs. Redwine and Wife.

f complainants' intention to call in question said fairly and *bona fide*, and without fraud, parted with possession of, and all right to control, said negroes by children, then the measure of damages and relief in is one-half of the difference between the price at defendant purchased them and their actual value, if the time of such purchase, with interest and half of hire during that time, less expense of keeping negroes." And because the Court, in lieu thereof, as re of damages and relief, charged the same as alled as to the negroes Pool and Charlotte bought by at his own sale, and afterwards re-sold by him. because the Court refused to charge the following request of defendant: "As to the negroes Harriet r, if the Jury shall believe from the evidence that lant purchased them at his own sale fairly and aud, and that the sale was otherwise legal, and efendant parted with said negroes, and that the at the time of filing this Bill, entirely beyond and this without notice on his part of any intenpart of complainants to question said sale, then e of damages and relief is the difference between the price at which said negroes were so purl interest thereon upon the one side, and half the id negroes and increase at the time of said gift possession, together with half the hire thereof e time of purchase and gift, less half the expen- g care of said negroes and raising said increase time, on the other side." t refused to grant a new trial, and defendants

and CROCKER, for plaintiffs in error.

LL, *contra*.

art.—LUMPKIN, J., delivering the opinion.

uit brought by Columbus L. Redwine and wife, Daniel W. Shine, the administrator of Robert ceased, the father of Mrs. Redwine, to account,

Shine vs. Redwine and Wife.

and charging him with multiplied acts of mismanagement; and especially with having bought at his own pretended sales, large and valuable portions of the estate, which he now holds, or has appropriated to his own use.

The testimony consists mainly of the defendant's own answer. Much time has elapsed since the date of these transactions, and we purpose, without going into detail, to discuss the following propositions, to-wit:

1. Has an administrator in this State the right to buy property at his own sale?

2. When an administrator has failed to comply with the Law in selling property, is he held to a more rigid responsibility, when the property of the estate is purchased by himself, than by other persons?

3. What is the rule or measure of damages when the administrator buys trust property himself and sells it again, and otherwise appropriates it to his own use?

It is contended by the counsel for the plaintiff in error, that it never has been decided by this Court, that an executor or administrator could not purchase property at his own sale—the transaction being free from all fraud. And it is alleged as error in the Judge, that he refused to charge the Jury upon request, that he could so buy, the sale being *bona fide*, and the trustee the highest bidder.

Let us settle this question *in limine*.

The case of *Worthy and others against Johnson and others*, 8 *Ga. Rep.*, 238, was this:

Thomas Worthy died. His heirs filed their Bill against certain purchasers of negroes sold by his executor at public sale, and against the present holders of certain other slaves, that were bought by the executors at their own sale, and which were subsequently sold by the Sheriff as the property of the executors. The Bill was demurred to on various grounds; and amongst other things, for want of equity, the Court sustained *each* of the grounds of demurrer, and this decision was excepted to and brought to this Court by writ of error.

Thus it will be perceived that the point was legitimately presented, as to the right of a representative to buy at his own sale. And this Court, upon full consideration, and upon argument and authority, thus disposed of the question—
“Can an executor or administrator become a purchaser at

Shine vs. Redwine and Wife.

sale?" In some of the States it has been decided sales are *per se* void. And the Legislature of this a recent Statute in relation to Sheriffs, have gone action this principle. They have not only prohibits from buying at their own sales, but declared all sales absolutely void; and, in addition, subjected to a public prosecution and severe punishment of a violation of the Law. And much said in support of this Statute upon the score of my. *note*.

doctrine, however, maintained as it respects this trustees by this Court, is this: That where a purchase by a trustee, on his own account of the *cestui*, although sold at public auction, it is in the option *ui que trust* to set aside the sale, whether *bona* or not; that it is voidable only, and not absolute. It is added—"The heirs should make their election a reasonable time; otherwise, they would be pre-

n, is the unanimous doctrine held by this Court, ding *obita dicta* to the contrary. And it is the judgment of the present Bench upon this point. erely as to the rule of damages.

of *Fleming and others against Foran and another*, 594, goes further. It was then held by h, that "an executor cannot become the purchaser sold under an execution against his testator; will be set aside, however fair and honest, on ion of the legatees, provided such application is easonable time; otherwise, it will be considered or abandonment of the right."

end the reasoning in this last case to careful l.

isposed of this preliminary question, we would every other fundamental exception in this case n the settlement of a single principle. It is at Shine, the administrator of Glenn—and if we are fully warranted by the record in assumption did not comply with the Law, which is the nduct in a single particular. He obtained the g the first sale prematurely; the second sale er the order had expired—seven years having

Shine vs. Redwine and Wife.

intervened—and he obtained his letters of dismissal on the same day that his final return was made. To all intents and purposes, then, so far as he is concerned, and it is the same thing as if he acted throughout without authority or leave, and his liability is to be judged of in the same way; and just here is the point upon which his accountability turns.

Ordinarily, although the trustee fails to observe the requisitions of the Law, still, if he can show that no injury resulted to the *cestui que trust*, by reason of the irregularity, he will, *perhaps*, be protected. Not so, however, where he becomes the purchaser of the trust property. And by a firm adherence to this salutary distinction, much mischief will be prevented by laying the axe to the root of the temptation to selfishness. Heirs and legatees do not litigate upon equal terms when they are called upon, as these complainants are, to contest with the administrator the *bona fides* of transactions which transpired twenty years since. Whether they be false or fair, erroneous or otherwise. All that is required of them is, to show that the order for the sale of the intestate's negroes was fraudulently obtained and fraudulently executed; and this they do, when they prove that the administrator utterly failed to comply with the Law in each and every instance; and that he became the purchaser of the property himself—directly, or indirectly through others—under such circumstances, he is chargeable with the present full value of the estate sold under those illegal orders, with interest, and his illegal dismissal will not screen him from accounting.—Or, if any of the property is still in his possession to convey the same to the complainants—or, if this can only be effected by a sale—to distribute the moiety of the proceeds to which the complainants are entitled.

In this way only can the stern policy be maintained, which the Law adopts to guard the rights of infants from invasion, and which it will not allow to be disregarded, or set at nought with impunity.

And it is in vain, for the administrator, to seek to shield himself behind the *ex parte* proceedings of the Ordinary.—These cannot shelter the trustee from the irregularity in his actings and doings. The Court presumes any thing right. The party acts at his peril, if it is not. If the Court is wanting in vigilance, the party must not be wanting in duty.

As to the measure of damages, then, we think it not clear

Shine vs. Redwine and Wife.

hat the complainants are entitled to recover the present value of the negroes which he has sold or given away, with hire. In *Bell vs. Bell and Others*, (20 *Geo. Rep.*, 250,) every thing was regular. Still, for the purpose of discouraging fraudulent administrations, procured by the trustee for the selfish purpose of possessing himself of the intestate's property, and not for the benefit of the heirs and creditors. This Court held the trustee responsible for the value of the land at the time of filing the Bill, with interest. (See also *Daniel vs. Sapp*, *id.* 574.)

And the cases in the Books go even beyond this, and allow the Jury to give special damage, beyond even the original value of the chattels (3 *Burr*, 1368; 2 *Black. Rep.*, 402; 1 *Atkin*, 429.) Even when the trustee has not acted from unfair motives, still, if he has sold the property contrary to his trust, he will be decreed to pay the utmost value. If he still holds the property, he will be compelled at the election of the *cestui que trust*, to convey it. The rules are different between breaches of contract and breaches of trust, as regards damages.

It may be said that in *Dorsett vs. Frith*, 25 *Geo. Reports*, 587, we held an execution *de son tort* only liable for the purchase money with interest. Mark the difference—Frith was not a purchaser at his own sale; he owned an interest in the slave sold by him; and while his conduct was characterized by the utmost good faith throughout, that of the adverse claimant was oppressive in the extreme. And, yet, Judge McDonald dissented from the rest of the Court, now in that case, on account of the Rule as to the damages being too indulgent.

But, admitting the Law to be as we have laid it down, it has not been observed by the Jury in making up their decree, as the calculation demonstrates. Allow to complainants the enhanced value of Pool, Charlotte and children, the negroes sold, and how stands the account?

S H I N E.

Cr.

By total amount of debts paid as per all his returns, . . . \$7401 70

LESS ASSETS AS FOLLOWS:

sale of perishable property,	\$1481 02
hire of negroes returned,	320 75
notes and accounts collected,	227 57

Shine vs. Redwine and Wife.

Account of negroes when sales are affirmed:

Man Bell sold for.....	465 00
Lydia and child,.....	861 00
Harriet,.....	628 00
Henry,.....	400 00
	<hr/>
	\$4383 74
Net balance of debts,.....	3017 96
Add interest at 8 per cent.,.....	4828 60
	<hr/>
	\$7866 56

SHINE.

Dr.

Harriet and 7 children, value and hire (by Paul,).....	\$5562 00
Pool,.....	3167 00
Esther and two children,.....	3060 00
Charlotte and child, (by McAllun,).....	4500 00
Guilford, hire only, (by Paul,).....	2200 00
Henry, Blacksmith,.....	4000 00
Willey,.....	1667 00
Mary,.....	700 00
Charles,.....	1575 00
	<hr/>
	\$26,451 00
Deduct debts and interest as above,.....	7,845 56
	<hr/>
Net balance,.....	\$18,604 44
	<hr/>
One half to complainants,.....	\$9,302 22

So ought to have been the verdict upon the maximum hypotheses. We take the statement, not allowing complainants the enhanced value of Pool, Charlotte and children:

SHINE.

Cr.

Total debts as before,.....	\$7401 70
Credit as previous statement,.....	\$4383 74
Add Pool's sale,.....	250 00
Charlotte,.....	365 00
Profit on the re-sale of two lost,.....	184 00
	<hr/>
	\$5182 74
	<hr/>
Net balance of debts,.....	2218 76
Interest on this sum at 8 per cent.,.....	3548 40
	<hr/>
	\$5767 16

Shine vs. Redwine and Wife.

SHINE.	Dr.
and hire as by former statement,...	\$26,451 00
his value and hire,	\$3167 00
and Children,.....	4500 00 \$7667 00
and hire, leaving out Pool and	
Charlotte,.....	\$18,784 00
profits and interest as his former cal-	
culation,.....	5,767 16
net debit,.....	\$13,006 84
to complainants,.....	\$6,508 42

dict of the Jury is for \$6,500.00, being just \$8.42 after leaving out Pool and Charlotte, which the court undoubtedly did. It will be noticed, too, that no interest was calculated on the hire, which ought to be regarded as due annually. This would largely increase the

amount, under any view of the Law, there is no earthly probability of granting a new trial.

It remains to add, that, in the opinion of the Court, John W. Vare was not disqualified on the score of interest in being in behalf of complainants on the trial of this case, he married the widow of Glenn and the mother of the complainant, Mrs. Redwine; but he will neither be disqualified by the event of this suit. Neither can the fact be given in evidence for or against him on the trial.

UNION DRAY LINE COMPANY, vs JOEL E. HURT.

When Cotton is to be transported through the medium of two common carriers, connecting with one another, it is the duty of him who performs his part of the transportation first, to deliver it to his successor, by at least placing it where it is easily accessible to him; but while the first cannot discharge himself by a less delivery than this, the next may bind himself by accepting a less.

Case, in Muscogee Superior Court. Tried before Judge WORRILL, at November Term, 1859.

This was an action brought by Joel E. Hurt, for the use of Alexander H. Sheffard, against the Union Dray Company, to recover the value of about 35 bales of cotton, alleged to have been received by defendant as common carriers, and which cotton was burnt and destroyed after it came into defendant's possession.

The defense was, that said cotton had been sent by the Mobile & Girard Railroad from Mr. Hurt's plantation, consigned to Stewart, Gray & Co., Ware-housemen in the city of Columbus; that upon its arrival at the Depot in Girard, opposite Columbus, it had been thrown off the cars, and while lying there on the side of the Road, and before its delivery to defendant by the Railroad Company, and before defendant had accepted or received the same, it was burnt by the fire which consumed the Railroad Depot, &c., and that defendant was therefore not liable for the loss of said cotton.

The cotton was burnt the second night after the day upon which it was thrown out.

After the testimony was closed, counsel for defendant asked the Court to charge the Jury as follows:

1st. That the Mobile & Girard Railroad Company's liability continued until they made a complete delivery of the cotton to the consignee, or their authorized agents, at such points as by their contract they were bound to deliver.

2d. That to constitute a complete delivery, the Mobile & Girard Railroad was bound to leave the cotton in a place where the consignee, or his agent, could conveniently examine it—count the bales, and carry them away.

3d. That if this cotton was promiscuously thrown among

Union Dray Line Company vs. Hurt.

300 bales of cotton, the consignee had a right to receive it, and the Railroad remained liable for so much said cotton as the consignee refused to receive; and if cotton was burnt, it is the loss of the Mobile & Gulf Railroad, and the defendant is not liable therefor.

[There were other charges asked and refused, but the exceptions taken to said refusal abandoned.]

The Court refused to give in charge to the jury, and counsel for defendant excepted.

The jury found for the plaintiff sixteen hundred and ninety dollars and thirteen cents. Whereupon, counsel for the defendant tendered his bill of exceptions, assigning as error, that the Court refused to give in charge as requested above.

MOSES, for plaintiff in error.

DOWNING, *contra*.

Court.—STEPHENS, J., delivering the opinion.

The Railroad and the Dray line, were both common carriers for the public; and as such, each had its own special duty to perform—the one in delivery, and the other in receiving the cotton for continued transportation to its destination. The Railroad, having finished its part of transportation when it had carried the cotton to the Dray Road, was still bound to turn it over to the next carrier to take care of it a reasonable time for the purpose of turning it over. What constitutes a good turning over from one to the other, so as to discharge the first, is to be determined by what is needful to be done in putting the successor in full possession of the goods; and no delivery is complete, unless it places the goods where they are accessible to the next carrier who is to take them.

In turning to a *consignee*, the carrier is discharged if he does what the consignee accepts as a delivery, and acceptance of a less delivery by the next carrier cannot detract from the full duty which he owes to the customer, as the article is in the actual control of his successor for transportation. But yet, the next carrier may bind himself though the predecessor can not discharge himself

Durham vs. Keaton et al.

by a less delivery than this; for while the carrier can not put off any of his duties to the customer, he may assume new ones. It does not follow, therefore, that the liability of the Dray Line began only when that of the Railroad ceased, and hence the Court properly refused to give the charges requested, concerning the cessation of liability on the part of the Railroad. While the cessation of liability on the one part, would be the beginning of liability on the other, in the absence of any stipulations between the two carriers varying the character of the delivery, yet the test fails when there are such stipulations. It was contended that there were such stipulations in this case, and some of the evidence looks in that direction. If the Dray Line accepted less than a legal delivery, they are bound by it, while the Railroad is not discharged by it. The agent of the Dray Line, however, could not have accepted for them a delivery out of the course of trade, that is to say, less than a legal delivery, without a special authority to do so. From this view of the case, we think the second charge asked in relation to the general rule as to what delivery the Dray Line was obliged to accept, ought to have been given, while the first and third desiring a test from the cessation of liability on the part of the Railroad were properly refused.

Judgment reversed.



DURHAM vs. KEATON, *et al.*

The rights and liabilities of a party not appealing, are determined and fixed by the first verdict; nor can they be changed by any further proceedings on the Appeal Trial.

Complaint in Dougherty Superior Court. Tried before Judge ALLEN, at June Term, 1859.

Durham vs. Keaton et al.

Justice Lumpkin gives a full statement of the facts of the case, in the opinion of the Court delivered by him.

DURHAM & DAVIS, for plaintiff in error.

WRIGHT & ELY, for defendants in error.

The Court.—LUMPKIN, J., delivering the opinion.

There was an action brought by Benjamin W. Keaton, on a promissory note for \$489 00, against Durham and Hartnett, as partners, and James Bond as security. Lindsey H. Durham testified that he never was a member of the firm of Durham and Hartnett; that he never signed the note sued on, nor authorized any one else to do so. He admits that he agreed to be the security of Hartnett on said note, and was thereupon a verdict should go against him as such. The Court found for the plaintiff the principal and interest on the note, together with the cost of the suit against Hartnett, as principal, and Lindsey H. Durham and James Bond, as securities.

Hartnett being dissatisfied with the verdict, entered a writ of error. Lindsey H. Durham refusing to litigate further. On appeal, the special Jury found against Hartnett and Durham as principals, and Bond as security. Whereupon, Durham moved for a new trial on the ground, that the verdict was contrary to Law and evidence in this; that it was against Durham and Hartnett, as principals, when Hartnett was the only party appealing. The Court overruled the motion, and this decision is excepted to and brought up to this Court by writ of error.

The Act of 1837, (*Cobb*, 500) is of difficult and doubtful construction. It professes to explain and amend the Judiciary Act of 1799, and assigns as the reason of its passage the diversity of opinion and diversity of practice which existed in the different circuits, upon the subject of error. We are sorry to say, that the Act, however well intended by its purpose, had only made confusion worse confounded.

As to the early interpretation put upon this Act, it is, to-wit: That parties who fail, or refuse to

Price vs. Webster & Palmes.

appeal, must abide by the first judgment as conclusive as to them, and that they cannot be affected by any future proceedings in the cause. True, *Bell vs. Bell*, 18 Geo. Rep. 38, may seem to be a modification of the former adjudications. It may be so in reality—still, the decision in that case is put upon the special circumstances, and was never intended to disturb the previous rulings.

If it be the will of the Legislature, that one of a half dozen plaintiffs, or defendants, shall control the rest of his associates, and compel them to litigate with or without their consent, let the General Assembly say so “by declaration plain.”

It is suggested that appeals are for the benefit of appellants. Who is to judge of that? Look at this case! The Petit Jury found Durham a surety only. To that, he consented, and by that verdict was willing to abide. Hartnett is dissatisfied with the verdict, not as rendered against himself, but in favor of Durham, appeals. Durham refuses to join him, and upon the appeal, Hartnett succeeds in having Durham bound as principal. We think the appeal verdict should be vacated as to Durham.

PRICE vs. WEBSTER & PALMES.

Good faith to a guarantor requires that the funds of the debtor should be applied to his own debts and not to debts for which he is not bound, and if the guarantee accepts of such a misapplication of funds for his own benefit, the guarantor may treat the wrong application as a nullity, and stand where he would do, if the right one had been made.

Assumpsit, in Sumter Superior Court. Decided by Judge ALLEN, at October Term, 1859.

Webster & Palmes sued John V. Price on a guaranty. On

1, plaintiffs read the guaranty in evidence, which is
78 :

"OGLETHORPE, January 22d, 1858.

ers. *Webster & Palmes*: Gents—The objects of this
to say to you that one Mr. Thomas M. Allen, a re-
mine, has taken an interest with Mr. F. M. Davis,
place. Mr. Allen is a minor, and I will answer half
of the concern, and I will render them such other
e as they may need.

(Signed) JOHN V. PRICE."

ffs then read a note, dated March 21st, 1854, and
ety days, for \$787.50, signed "F. M. Davis," and
o plaintiffs or their order.

Es, also, introduced the testimony of Amos E.
which is as follows:

te sued on was given in settlement of an account
furnished F. M. Davis, of Oglethorpe, at the time
e quantities mentioned in the annexed statement.
as clerk of plaintiffs during the period embraced
unt. All that witness knows of a partnership be-
is and Allen was gathered from Price's letter.—
never heard of the dissolution of said partnership
it was brought. Plaintiffs were induced by Price's
rnish the goods to the concern doing business un-
ne of F. M. Davis.

ount annexed to the testimony of Webster, and
also read in evidence, is made out in favor of
gainst F. M. Davis, and shows items of goods
and dealings between the parties, commencing in
1852, and continuing down to June, 1854, and
the result of the dealings between the parties
entire period, a balance of \$787.52, for which
ed on was given. The aggregate amount of the
etween \$7,000 and \$8,000—the payments made
o time, after the partnership of Davis & Allen
having reduced it to the balance above named.
further shows that, at the time said partnership
Davis was indebted to plaintiffs some \$1,500 or
this indebtedness goes to make up in part the
ount reduced by payments as above stated.

Price vs. Webster & Palmes.

Plaintiffs closed their case, and defendant proposed to introduce the testimony of Thomas M. Allen, to prove that he was in partnership with Davis a short time only and then acted as his clerk, and further, that payment of the note was never demanded of him, and that, if it had been, he could have paid it out of effects of Davis in his hands.

The Court, on motion, rejected this evidence on the ground that Allen was interested in the event of the suit.

The Jury returned a verdict in favor of plaintiffs for one half the amount of the note, and defendant moved for a new trial on the following grounds:

1st. Because the Court erred in refusing a non-suit when moved for by defendant's counsel on the ground of a want of notice to defendant in a reasonable time of the acceptance by plaintiffs of his guaranty.

2d. Because the Court erred in charging the Jury that no notice is required in Georgia to be given to the guarantor of the acceptance of his guaranty, in order to fix his liability.

3d. Because the Court erred in striking defendant's pleas setting up want of notice and the great lapse of time before recourse was had to defendant to enforce this claim.

4th. Because the Court erred in rejecting the evidence of Thomas M. Allen.

5th. Because the verdict is contrary to the evidence.

6th. Because the letter of credit given by defendant is within the provisions of the Statute of Frauds.

7th. Because of variance between the allegations and proof.

8th. Because the proof shows that plaintiffs gave the principals indulgence, and shows a want of diligence in collecting the note of F. M. Davis, and does not show a demand on the principal and notice to defendant of the dishonor of the note.

9th. Because plaintiffs do not prove that, after the transaction between the parties were closed, they gave notice to defendant of the amount for which they held him liable.

There were other grounds taken, but it is unnecessary to state them.

The Court refused a new trial and defendant excepted.

S. C. ELAM, for plaintiff in error.

MCCAY & HAWKINS, *contra*,

Court.—STEPHENS, J., delivering the opinion.

le view disposes of the case now and hereafter, and necessary to allude to the numerous points presented e think, the verdict is against the evidence. Price d the payment of half the debts of Davis & Allen, dollar of the pre-existing debts of Davis; and this n effect founded on one of those pre-existing debts, a debt of Davis and Allen. The payments made t Allen, if applied to their own indebtment instead of Davis, would have left nothing due from them note was given, and the plaintiffs were bound for application of the payments, and are bound now and treat the payments as having been applied ght to have been applied. The funds of Davis & it to have been applied to the debts of Davis & hether or not the misapplication was made with of Davis & Allen, is immaterial; for, while the re not bound for the good faith of these principal transactions with other people, they *were* bound ood faith in all transactions with themselves, de their own consent. The plaintiffs could not con-ong application of the funds without a violation h to the guarantor, and the guarantor is entitled wrong application as a nullity, and to stand where if the right one had been made.

reversed.

Way & Taylor vs. Brown & Carmichael.

WAY & TAYLOR vs. BROWN & CARMICHAEL.

1. Under the 9th Equity Rule, an injunction to restrain a Common Law action ought not to be granted, unless the application is made thirty days before the trial term of the case, or a good reason given for the delay.
2. There is no equity in a Bill which asks the injunction of a Common Law action upon the grounds: 1st. That the complainants do not owe the debt on which the pending suit is founded. 2d. That the defendants, by suing out garnishment against a person who held assets of the complainants, have prevented the complainants from paying their debts.

In Equity, in Sumter Superior Court. Decision by Judge ALLEN, at October Term, 1859.

Defendants in error filed their Bill in Equity against Way & Taylor, alleging, that in 1855 they, Brown & Carmichael, having entered into a copartnership to carry on a warehouse and commission business at Americus, Ga., made an arrangement with Way & Taylor, of Savannah, Ga., to consign to them all the cotton controlled by complainants, and to use their influence in sending them business, in consideration of which said Way & Taylor were to accept all drafts to be drawn by complainants on them; that in pursuance of this arrangement, complainants did all they could to sustain and patronize said Way & Taylor. Complainants further state, that they shipped several thousand bales of cotton to said Way & Taylor, and that one of the complainants, being the agent of the Bank of Savannah, insured large shipments of cotton of buyers and planters, to be forwarded to said Way & Taylor; for which labor and passage no charge was made, for the reason that it was expected no charge would be made by the latter for accepting complainants' drafts. It is further stated, that on the dissolution of complainants' said firm, in 1857, said Carmichael removed to Albany, Ga., and by agreement with his partner, Brown, left all the assets of said firm in the hands of the latter to pay the firm debts, &c.; that sometime after said Brown absconded and left the said assets with one Brown, the clerk of the old firm; upon ascertaining which, complainant Carmichael came to Americus and demanded the books and assets of said firm, with the view of settling the joint debts, which assets amounted, at the time of the

Way & Taylor vs. Brown & Carmichael.

to \$40,000, and the debts to only \$30,000; and partnership was then solvent, and that if he, Carmichael, had got possession of the said assets, he paid off the firm debts; but when he applied for them, he was told he could not get them, as said firm had been garnisheed at the instance of said Way and Bail, and the other an Attachment against its on an account for acceptances, commissions, some eleven thousand dollars, and thus held up the said firm so that the same could not be controlled by complainant Carmichael; and that great loss to him in consequence of their being thus held up were of parties during the time they were so held, further alleged, that said Way & Taylor are pressing suits now in the appeal in Sumter Superior Court that Way & Taylor are insolvent, &c. The Bill was for an injunction to restrain said law action, &c.

was presented to the Chancellor for his sanction before Term, 1859—the Common Law action having pending on the appeal since the April Term pre-

ceding: having passed an order granting the injunction and counsel for Way & Taylor excepted thereto, and for on the following grounds:

1. Because there is no equity in the Bill, because it is not to be granted.

2. Because it should have been sued out at least thirty days before October Term, 1859, or some good reason shown for doing so.

3. Because the Common Law proceedings referred to in the Bill were not attached thereto as exhibits. (They were not, but leave was asked by complainant to refer

to GEORGE and IRWIN & BUTLER for plaintiffs in error.

[LAWKINS, *contra*.]

Webb vs. Fleming.

By the Court.—STEPHENS, J., delivering the opinion.

1. We think that under the 9th Equity Rule, the application for this injunction came too late, unless good cause had been shown for the delay. None was shown, and the application ought to have been refused.

2. We think, moreover, that there is not a semblance of equity in this Bill. The first ground upon which it is based amounts to nothing but a denial of the debt whose prosecution it seeks to enjoin. Surely there was no need of equity jurisdiction to make that defense. The only other ground is, that the complainants had been prevented from paying their debts by a garnishment which the defendants had sued out against a person who held assets of complainants. If the garnishment was sued out wrongfully, they have a complete remedy by suit on the garnishment bond; if it was sued out rightfully, they are not entitled to any remedy at all. We think the motion to dissolve the injunction and dismiss the Bill, ought to have been sustained.

Judgment reversed.

EWELL WEBB vs. WILLIAM W. FLEMING.

1. A testator's acknowledgement of his signature in the presence of the subscribing witnesses is sufficient, without the signings being done in their presence.
2. It is not necessary that the subscribing witnesses should sign in the presence of each other; it is sufficient if each signs in the presence of the testator.
3. An attempt to manumit a slave avoids that part of a Will which relates to that object, but not the remainder of it.
4. The verdict in this case held to be supported by the evidence.

Caveat to Will, in Early Superior Court. Tried before Judge ALLEN, at April Term, 1860.

Ewell Webb filed his Caveat to the Will of Mark Sanders, on the following grounds:

1st. Because said testator did not sign said paper in the presence of all of said witnesses, nor either of them.

2d. Because he did not sign said paper purporting to be a Will.

3d. Because the witnesses did not sign said paper in presence of each other.

4th. Because said Will attempted to manumit or give freedom to a slave, and is therefore void.

5th. Because said Will was not the free and voluntary act of said Mark Sanders.

6th. Because undue influence was used in the procurement of said Will, and therefore said Will is void.

The cause being for trial on the appeal, the following evidence went to the Jury:

Thomas T. Smith testified: That he signed the paper produced to him the day of its date, or about that time; went to the house where Sanders was after dark; he had received a note from Jeff. Hutchens, requesting him to go there, and which had caused him to go; was met at the house by Hutchens, who said that they would not go into the house until Mr. Taylor and his family had retired for the night; they were in a room up stairs; when they went into the house, about 9 o'clock, Sanders was in bed, with his face to the wall, quite feeble; no person present but Hutchens, Sanders and witness; Hutchens produced the Will; he first saw it in Hutchens' hand or possession; Hutchens approached the bed and said to Sanders: "Mark, Tom is here to attend to that business;" Sanders said, "Yes, this is my Will; it is written as I want it; I want you to witness it." He then subscribed the paper in the presence of Sanders; Sanders did not sign or say he had signed it in witnesses' presence; Will was not read either by Hutchens, Sanders or witness; he did not know the contents of the Will; witness remained there during the night; after Hutchens and witness retired from the room of Sanders, Hutchens told witness to say nothing about the fact of the making of the Will; no one must now but the witnesses until Sander's death; that Sanders did not want Col. Taylor to know he had made a Will; witness believes the paper to be in the hand-writing of

Webb vs. Fleming.

Hutchens; had known Sanders about three years; he was a very intemperate man; he and Hutchens were warm friends—associated together; Hutchens was a very shrewd, intelligent man, and sustained a good character; after the Will was signed, Sanders handed it to Hutchens, saying, "Take care of it." Hutchens folded it up and handed it to witness, requesting him to put it in his iron safe, which he did; Sanders was afflicted with a disease of the bowels; had been sick a long time; during his sickness Hutchens stayed with him a great deal—almost continually; during the latter part of his sickness he had to be lifted out and in his bed; knew of no relations Sanders had in that part of the county; thought he was of sound and disposing mind; saw no one attempt to influence him to make a Will; had negroes of his own.

Martin T. Alexander said: He signed the Will or paper presented on or about the day of its date; lived about a mile and a half from where Sanders did; Sanders lived at Henry Taylor's plantation; was in no business, but made that his home; he went there in response to a request of Hutchens; when he arrived at the house, found Hutchens and Sanders, Hutchens in bed; soon after, he went into Sanders' room; Sanders said he wanted witness to sign his Will; Sanders had it in his hand; witness signed the Will in presence of Sanders; Sanders made his mark; no one present but Hutchens, Sanders and himself; Will was not read in his presence by Sanders, or any one else; Sanders had the Will in his hand but a minute or so, and did not read it; after Hutchens and witness had retired from the room, asked Hutchens what was in the Will; Hutchens said it was not customary to tell, and Sanders did not want any one to know it until his death; witness does not now know the contents of the Will, except from what he has heard; witness was frequently at the house where Sanders was; frequently or always found Hutchens there; Hutchens lived at Howard's Landing, about four miles distant; he and Sanders were good friends; Sanders died in the month of July last year; at the time Sanders signed the Will witness thought him of disposing mind and memory; saw no influence exerted by Hutchens or others to induce him to make the Will; Sanders handed witness the Will; said he had not signed it; Sanders told witness to write his name; he was too nervous to write it, which he did.

n A. McDowell testified : That he went to the house Sanders was about 11 o'clock in the day ; it was the paper presented was dated or about that time ; was o go there, but frequently went in to see how San- ; Hutchens came out of the room where Sanders ed ; Sanders produced the Will or paper ; does not he got it ; and asked witness to sign as a witness ; and gave it back ; Hutchens told him to say no- ut it, as Sanders did not wish any one to know it r his death ; no one was present when he signed but Hutchens, himself, and perhaps Mr. Power ; not read while he was there by Hutchens or any

Fryer testified : That he believed Mark Sanders e his name ; had seen him sign a note ; had re- ers from Sanders ; did not know that he wrote

ermans testified : That he had received an order ers, and when he saw him afterwards, said he had

l gave all of testator's property to J. Hutchens Power, to be equally divided between them, after his debts ; and after selling his boy Henry and roceeds purchasing the girl Rose, who was, b his executor, to be freed from service to himsel r person.

y having found in favor of the propounder of ounsel for caveator moved for a new trial on the t the verdict was contrary to evidence, contrary l decidedly and strongly against the weight of

t refused the motion, and counsel for caveator

& DOUGLASS, for plaintiff in error.

MAFFORD, *contra*.

ert.—STEPHENS, J., delivering the opinion.

ermine whether or not this verdict is supported

Webb vs. Fleming.

by the evidence, the evidence must be applied to the different issues presented by the different grounds of caveat. The first ground is, that the testator did not sign the Will in the presence of the witnesses. The evidence is, that he did sign it in the presence of the witness, Martin, and that, by his conduct, he clearly acknowledged his signature in the presence of each of the other two. And that was sufficient.

2. The second ground, that he did not sign the Will, is covered by what has just been said on the first ground.

3. The third ground is, that the witnesses did not sign the Will in the presence of each other. That was not necessary; it is sufficient if each witness subscribes in the presence of the testator.

4. The fourth ground is, that the Will attempts to manumit a slave, and is therefore void. The Will does provide for the purchase of a slave by the executor, and her manumission afterwards, and the part of the Will relating to that object is void; but the remainder is good, as has been frequently held by this Court.

5. The fifth ground is, that the Will was not the free and voluntary act of the testator. In support of this ground, it was argued, that the Will being written by Hutchens, who is a principal legatee, strong proof was necessary to show that the testator knew the contents of the paper, but that the proof on this point was very weak. We think the evidence on that point is satisfactory. The testator, as appears from the evidence, could read and write, and the testimony of Smith is, that when he subscribed as a witness, the testator produced the Will to him. He produced the Will without getting out of bed, and without assistance from anybody. He must, therefore, have had in bed with him, actually nursing it. We think it is a fair and satisfactory conclusion that the deep interest which he manifested in the subject, led him to make use of the ample opportunity which he had of knowing the contents.

6. The sixth and last ground is, that undue influence was used in the procurement of the Will. There was none at all in support of this ground. We think that all of the issues presented by the caveat are either bad in law or satisfactorily met by the evidence.

Judgment affirmed.

CARTER *et al.* vs. CHRISTIE.

note to H., in consideration that he is to receive two thirds of the profits of the Medical firm of H. & C. H. collects one-half in one-third of the profits, and appropriates it to his own use. H. sues on the note. *Held*, That *at Law*, it was competent for C. to plead as the note, the excess of profits received by H., and have the same a credit upon the note.

int in Stewart Superior Court. Tried before Judge at April Term, 1860.

Christie sued Jardine E. Carter, and William P. a note for \$1,250, dated July 26, 1852, and due st, 1854. The defendants pleaded that the note to Dr. William M. Hardwick, in part execution of ship contract between said Hardwick and Jardine by the terms of which contract, Carter was to rds of the profits of the partnership for the years , and 1854; and that Hardwick has received and el \$650 more than his share of the profits for the —having received one half, instead of one-third, fits for that year.

rial of the case, the defendants read, in evidence, ay of the plaintiff, who stated that he bought the n, from Dr. Hardwick in 1856 or 1857, and after is due; that he did not then know what was the n of it, nor did Dr. Hardwick tell him until after s brought.

ts then offered, in evidence, the testimony of Dr. nes, to prove that in 1852, the witness, Dr. Car-

Hardwick, made an agreement, by which Jones bought an interest in Hardwick's medical prac- years 1852, 1853, and 1854, and in considera- h, the note sued on, with others, was given; the eing that, for the years 1852 and 1853, Jones vere to receive one half the profits of the medi- hip thus formed, and that if Hardwick did not he practice at the close of the year 1853, the vas to be continued during the year 1854, each ng equally in the profits—it being agreed that ould not retire if Carter and Jones objected.

Johnson vs. Baldwin.

There is but little consideration due to Mr. Christie, as the holder of the note. He swears that he took it and sued on it, to accommodate Dr. Hardwick, and that Dr. Hardwick is bound to pay him the money, provided he fails to collect it out of Carter. Under these circumstances, the note should be treated as the property of Dr. Hardwick, and the action prosecuted for his benefit.

JOHNSON vs. BALDWIN.

A continuance will be granted in order to give a party an opportunity of compelling a witness in another State to answer interrogatories, even in the absence of knowledge on the part of the Court, as to whether the Laws of such State will furnish the compulsory process or not.

Motion for Continuance, in Randolph Superior Court.—Decided by Judge PERKINS, at November Term, 1859.

Jacob Johnson filed a Bill in Equity against Moses H. Baldwin, alleging that said Baldwin had previously sold to one Sikes a lot of land, taking his notes for the purchase money, which notes Baldwin had transferred for value; that complainant had purchased said lot from Sikes and paid him for it, and that Baldwin had recently commenced his Action of Ejectment to recover said land, &c.

When the case was called for trial, complainant moved to continue the same, on the ground that previous to the last Term of the Court, he had sued out a commission to take the testimony of Benajah Bass, a resident of the State of Alabama, which had not yet been returned executed. That he had sent the Interrogatories to the witness by mail under a promise from him that he would have them executed and returned. They were returned unanswered—the witness declining to answer them; that since last Court he had receiv-

Johnson vs. Baldwin.

her letter from Bass, promising to answer them if re sent over. Accordingly complainant dispatched with them, who returned on the Saturday night before present Term of the Court with the Interrogatories read—the witness refusing to answer them.

Complainant asked to continue the case, that he might counsel in Alabama and compel Bass to answer.

Expected to prove by Bass that Baldwin had repeated witness that he had received the pay for the land from Sikes.

Court overruled the motion and required the cause to stand and counsel for complainant excepted.

and ROBINSON, for plaintiff in error.

BASS & DOUGLASS, *contra*.

Court.—STEPHENS, J., delivering the opinion.

ask; the continuance ought to have been granted.—Complaint sought was most material, and the complainant to have used diligence to get it. The suggestion that he had been deficient in diligence, but that, so far as we know, he has exhausted his power, and has no chance of being able to get the evidence hereafter; for, it is true we do not know that the Laws of Alabama provide us to compel a witness resident there to answer inquiries from another State. We think, they do furnish us with the means; but we surely do not know that they do *not*, but fair that the party should have an opportunity

to be reversed.

ROBINSON *et al.* vs. GEORGE W. TOWNS.

1. The assignment of a judgment and execution conveys away the plaintiff's interest in the further enforcement of it, but not his interest in money which the Sheriff has previously collected on it.
2. Judgments on rules against a Sheriff are admissible in evidence against him and his sureties, in an action on his bond for failure to pay over moneys so adjudged against him.
3. The attorney of a non-resident plaintiff is an incompetent witness for his client.

**Action on Sheriff's Bond, in Muscogee Superior Court.
Tried before Judge WORRILL, at May Term, 1859.**

The defendants in error brought suit on the bond of Seymour R. Bonner, deceased, late Sheriff of Muscogee County, against Alexander J. Robinson, his administrator, and the administrators of the securities to said bond; alleging that Bonner had collected money on a *fi. fa.* in favor of said defendants in error against Thomas Moore and had failed to account for it. To this action, pleas of the general issue, payment, &c., were filed, and that the securities were discharged, because the plaintiffs in the action (defendants in error) had granted the Sheriff indulgence, &c. On the trial of the case, the following testimony was introduced:

Plaintiffs read their *fi. fa.*, returnable to January Term, 1841, of Muscogee Inferior Court, and the order allowing them to sue on the Sheriff's bond. They then read an entry on the *fi. fa.*, made by Bonner in January, 1842, showing that he had received on the *fi. fa.* that day, \$839.34, and another entry dated October 15th, 1841, showing the amount then received on said *fi. fa.* to be \$415.00.

Here plaintiffs closed, and defendants proposed to read the balance of the entries on said *fi. fa.*, consisting of a transfer of said *fi. fa.* to Henry L. Benning, dated November 3d, 1842, together with sundry entries of payments made to the attorney of said assignee, of moneys raised on said *fi. fa.*, other than those specified in the entries read in evidence by plaintiffs. Objection was made to this evidence and the Court rejected it.

Defendants then read a receipt of plaintiffs' attorneys,

Robinson et al. vs. Towns.

& Downing, dated March 13th, 1848, in which they edge to have received from Bonner \$474.45 on said said amount consisting of \$178.25 collected by them ner on a fi. fa., in his favor, and \$301.20 in a note r T. Colquitt received by them as cash.

Blackman was introduced by defendants, and tes- that, as agent for Bonner, he paid Thomas & Down- 848, the sum of \$474.45 on said fi. fa., being the named in their receipt; and that about the 19th of r, 1845, Bonner, in the presence of the witness, her settlement with Thomas & Downing (plaintiffs' .) at which time said attorneys receipted to Bonner \$800. No money was paid by Bonner, but said elated to collections which had been made by said for Bonner, and did not include the amount speci- former receipt. The witness also testified that he omas & Downing say, at the time last referred to, er then owed only about \$135 on said fi. fa., and had in their hands notes belonging to Bonner, y believed to be good, more than sufficient to satis- uance due on said fi. fa., and which they would ap- payment of said balance. He further stated that t for over \$800 had been lost by Bonner as testi- him; and that he, in 1842, received thirty dollars s & Downing as agent for Bonner on account of llected by them for Bonner.

Defendants closed; and plaintiffs read an exemplifi- n the Inferior Court, showing that they had ob- Rule Absolute there against Bonner for some principal and interest, and that upon issue made Court at the instance of Bonner, alleging that Absolute had been paid off, said issue was deter- ist Bonner.

Downing, one of plaintiffs' attorneys, was then nd on his *voir dire* stated that his clients (the ere all non-residents of Muscogee County at the as brought, and still were. Defendants objected not a competent witness, on the ground, that eing non-residents, he was liable for the costs of f was therefore interested. The Court overruled n, and Mr. Downing testified at considerable ng, amongst other things, that the receipt for

Robinson et al. vs. Towa.

\$800, given Nov. 19th, 1845, referred to by Blackman, embraced also the \$474.45 mentioned in the receipt of Thomas & Downing, of March 18th, 1843—the receipt given on the said 19th day of November being made to include the amount paid then, as well as the amount paid previously, so as to make one receipt show the whole amount paid by Bonner—such being the purpose had in view as well as witness recollects. Mr. Downing also denied that he had ever stated that Bonner owed only \$185 for money collected on said f. fa., and that Thomas & Downing had notes of Bonner's sufficient to pay off that balance.

The Jury returned a verdict for plaintiffs for the sum of \$1,471.24.

Defendants moved for a new trial on the following grounds:

1st. Because the verdict is against the evidence; because the Court allowed two of the entries on the execution of Thomas R. Lamar and Abner McGehee, executors, &c., against Thomas Moore, to be read in evidence without requiring all the entries on said execution to be read.

2d. Because the Court refused to allow all the entries on said execution to be read to the Jury.

3d. Because the Court refused to allow a transfer of said execution from plaintiffs to Henry L. Benning, dated Nov. 8d, 1842, to be proven and read in evidence, to show title in said execution out of plaintiffs at the time this suit was instituted.

4th. Because the Court refused to allow the receipt of Colquitt, Echols & Jeter of \$461.12, proceeds of sale of house and lot sold on 1st Tuesday in October, 1841, which receipt was endorsed on said execution, to be read in evidence.

5th. Because the Court allowed an exemplification of *rule nisi* in favor of said Bonner against plaintiffs, to show cause why Rule Absolute formerly granted against Bonner should not be discharged, and satisfaction entered thereof of record, and judgment of the Court thereon to be read in this case.

6th. Because the Court allowed an exemplification from the Inferior Court of a Rule Nisi and Rule Absolute against said Bonner, as Sheriff, to be read in evidence, although there was no evidence that service of said Rule Nisi had ever been perfected on said Bonner.

7th. Because the Court admitted the testimony of L. T.

g, although it appeared from said Downing's examination that he was one of the attorneys of record of the case, who resided, at the commencement of the suit, Muscogee County, and when it appeared that said Downing, as plaintiffs' attorney in this case, had received part payment of said execution against Moore, and was authorized to receive them by plaintiffs, and he, Downing, did not deny that he was not authorized to receive full payment thereof in good notes, and it appeared from the testimony of Blackman that he had received notes from Bonner in full payment of said moneys received by Bonner, as part of said execution, and consequently he was interested in the event of said suit.

Because said Downing was an incompetent witness on account of interest: 1st. Because he was attorney for non-resident clients, and therefore liable for perjury. 2d. Because, having received notes from Bonner in full payment of amounts collected by Bonner on said execution, he had made himself responsible to plaintiffs, and consequently was interested in obtaining a recovery in this case.

Because what Downing testified to was informed by reason of the relationship of client and attorney.

Because the verdict is against Law and the evidence.

A motion for a new trial was refused by the Court, and the judgment of the Court in favor of the defendants excepted.

VERDICT, for plaintiffs in error.

& DOWNING, for defendants in error.

Court.—STEPHENS, J., delivering the opinion.

I think that the Court properly excluded the entries which the defendants desired to have read in evidence. The defendants attempted to show a discharge of the Sheriff's duty by the Sheriff's ability to pay over to the plaintiffs in execution the money which he had collected for them before their arrest at the judgment. The entry which was chiefly urged by the defendants to have gone in evidence, was the assign-

 Robinson et al. vs. Town.

ment itself. It was said that the plaintiffs could not maintain the suit, because they had parted with their interest by the assignment. They did part with their interest in the further enforcement of the judgment, but not with their interest in their money which the Sheriff had previously collected on it. The assignee acquired, and they lost the right to enforce the judgment as it stood at the time of the assignment, that is to say, the right to collect what was still due on the judgment, out of the defendant in it. Money previously collected and held by the Sheriff would not be reached by an exercise of the assignee's right of enforcing the judgment, for such money was the fruit of the previous enforcement of the judgment to that extent. Such money constituted a debt from the Sheriffs to the plaintiffs, to be enforced by rule or suit against him.

2. We see no error in the admission in evidence of the former judgments against the Sheriff.

3. We think Mr. Downing was an incompetent witness, on account of his interest in the costs. The Act of 1812, in relation to the liability for costs on the part of counsel for non-resident plaintiffs, *Cobb's Dig.*, p. 505, consists of two sections creating different liabilities. The first section makes the attorney liable for costs whenever his client, being a non-resident plaintiff, is cast in his suit; and this section is left unaffected by subsequent legislation. The second section makes both the attorney and client, that client being a non-resident plaintiff, liable for costs, whenever the plaintiff gains the case, but the defendant proves to be unable to pay the costs. This section is modified by the subsequent Acts of 1834 and 1842, (on the next two pages,) so as to leave out the liability of the attorney in *that class* of cases. The result of all the Acts is, that the attorney of a non-resident plaintiff, as Mr. Downing was, is liable for costs if he fails to get judgment against the defendant, and not liable if he succeeds. But it was argued that the plaintiffs must have had a verdict, without Mr. Downing's testimony, for an amount which, though far below their claim, would have carried the costs; and that Mr. Downing was therefore secure from costs, either with or without his own testimony. We do not think so. On the testimony of Mr. Blackman, without the explanatory and contradictory statement of Mr. Downing, there might have been a clear result

Ross vs. Davis et al.

defendant. We do not intend to be understood as saying that such a verdict either ought, or ought not, to be rendered, if Downing's testimony had been out of the way, but only that we should not feel authorized to set the verdict aside.

Not reversed.

ROSS vs. DAVIS et al.

Execution Docket, made out by himself, or deputy, is admissible in an action by the administrator of the Clerk against the administrator of the Sheriff, to show, *prima facie* the amount of cash due the administrator, *fi. fas.*, and that the *fi. fas.* were delivered to the Sheriff.

Bibb Superior Court. Tried before Judge LAMAR, June term, 1860.

Plaintiff in error brought an action of debt against the administrator of the bond of a former Sheriff, Davis J. Ross, for an amount of money claimed to be due the administrator of the late Clerk of the Superior Court, on account of his costs, collected and said Davis, Sheriff, in his life time, on *fi. fas.* processes placed in his hands for collection.

At the trial of the cause, counsel for the parties agreed to refer the case to the Court, for decision, the following questions:

1. Whether the administrator of the late Clerk vs. the administrator of the late Sheriff, and his securities for costs collected by the Sheriff on various *fi. fas.* alleged to be placed in the hands of the Sheriff, is the regular docket of Bibb Superior Court and the entries in the docket and the entries are kept either in the

Ross vs. Davis et al.

hand-writing of the Clerk, or his deputy—evidence to show *prima facie* the amount of costs due the Clerk on cost *fi. fas.*, and that the *fi. fas.* were delivered to the Sheriff?

If the usual proof is made by the Clerk, that the dockets are correctly kept, &c., as in case of merchant's books, are the dockets then *prima facie* evidence to charge the Sheriff as above?"

After considering the above propositions, the Court decided against each of them, "holding that the docket was not evidence, either as record or as private books, and that the same be excluded as such evidence." To which counsel for plaintiff excepted, and assigned the same as error.

WHITTLE, for plaintiff in error.

RUTHERFORD, for defendant.

By the Court.—LUMPKIN, J., delivering the opinion.

I confess my mind is not very clear upon the question in this case. The Clerk is required to keep an execution docket for the special purpose of entering the names and stating the cases of parties—plaintiffs and defendants—and when executions are returned satisfied by the Sheriff, to transfer the Sheriff's returns to said execution docket. It is not even said that the amount of principal, interest, and costs, shall be stated. And yet we know that the execution docket is made out in this way; and that it is to that we invariably refer to ascertain the amount of these several sums. So, also, it comes within our knowledge, that it is also usual. I never knew it omitted for the Clerk to state, to which Sheriff, principal, or deputy, the *fi. fa.* was delivered, and also the time when it issued and was delivered. And we always refer to this docket, when prosecuting a rule against the Sheriff, to charge him at the instance of the plaintiff; and I should certainly hold with great confidence such entry to be, at least, *prima facie* evidence against the Sheriff, in favor of third persons. I am rather inclined, therefore, to hold, that to the same extent, it is good, when the proceeding is at the instance of the Clerk for his costs. These dockets are public books deposited in the Clerk's office, subject to the duty

of the Sheriff and every body else. They are in the private memoranda of the Clerk, but the private as well as public monuments of his official transactions are said to be customary with some Clerks, to take the Sheriff's receipt for all executions which are delivered to him, and he never knew this done.

On the other hand, the Law does require the Sheriff to keep a regular execution docket, wherein he shall enter all executions delivered to him, and the dates of such executions. What Sheriff does this? Not a dozen in the county, perhaps half that number. If he has done his duty, let him produce his docket—let him comply with the Law—let him produce his docket, and he will furnish counteracting testimony in his favor. If he does not keep a docket, but chooses to settle by the word of his mouth, he will not be judged by that from the necessity of the case, but he should be allowed to go in evidence. It would be a great injustice to the Clerk a purpose, when making out a docket at some remote period in the past, to saddle the Sheriff with a liability for process, which never came to his aid. When these entries are made in the docket, the Sheriff lives, and constantly referring to this book, and the docket, and expose any premeditated fraud to work an injury to the party.

As to books, kept by the party himself, which have been offered to go in evidence, I know of none so free from the suspicion of being made up, to manufacture a docket, as the Clerk's Execution Docket.

 Jones vs. Robson.

JONES vs. ROBSON.

A Bill of Review will not be sustained, when it does not make a case which requires a reversal of the former decree, nor which would authorize a new trial.

In Equity, from Calhoun County. Decided by Judge ALLEN, at Chambers, 12th September, 1859.

A Bill was filed by Elizabeth Jones against Jesse Robson, upon which there was a decree in her favor. Robson carried the case to the Supreme Court, and the judgment of the Court below was affirmed. The case, with the facts reported, will be found in 27th vol. *S. C. Reps.*, p. 266.

With the view to restrain the enforcement of said judgment, and to set it aside and get a new trial, the said Robson filed his Bill for Review and injunction against Elizabeth Jones on the ground, mainly, of certain frauds charged to have been committed in procuring evidence for complainant in the former case.

The Bill charges, that the deposition of Henrietta Dudley, the wife of John D. Dudley, and daughter of Mrs. Jones, was taken by commission and read in the former case; that hers, with that of Allen Smith, a brother of Mrs. Jones, constituted the chief evidence for the latter; and that since the trial, and motion for new trial, complainant has discovered new and material evidence, as appears by affidavits appended to the Bill, as follows:

A. Barnes and Windsor Follett, the commissioners who took the testimony of Mrs. Dudley under the commission referred to, state under oath, that Mrs. Dudley was sworn, and was giving her answers to the interrogatories, she read them from a piece of paper in her hand that was written upon, and refused to let the commissioners read them.

William Leonard states under oath, that sometime in the Spring of 1859, he was at Mrs. Jones', and read at her request, some two or three letters from her son-in-law, John D. Dudley, in one of which he states that he claimed half of the judgment against Jesse Robson, for his services in going to Washington County, and assisting in obtaining said judgment; and that if she did not satisfy his claim, that he

Jones vs. Robson.

ould very easily undo what he had done in obtaining said judgment. Deponent states that the above is his conclusion from reading said letter. Mrs. Jones said to deponent, that he did consent to settle some portion of said judgment on Henrietta Dudley, but was under no obligation to him.

Mary Owens states under oath, that she lived with Mrs. Elizabeth Jones and her husband, James Jones, three years—1838, 1839, 1840—and that she never heard of any contract being made between Mr. and Mrs. Jones with regard to his not claiming her interest in Drury Stokes' estate in his name. In 1843, Mrs. Jones, while moving to Randolph County, stopped with deponent, and whilst there, told deponent that she had given up all she had to Jones' creditors, except what she had with her; and deponent saw nothing but some household and kitchen furniture. She further told her, there was thirteen or fifteen hundred dollars put on interest for Drury Stokes. This conversation took place after the sale of Nancy Stokes' estate. She also informed deponent, that after the death of Georgia Ann's brother, Drury J. Stokes, Mr. Jones went to Court "to try to get to be his heir."

The complainant, Robson, alleges that the answers of Mrs. Dudley were proposed for her by another, and that they are not true in fact; that the question of interest was put to her, which she answered in the negative; that her interest was before unknown to him, and that Dudley, her husband, instigated her suit; he alleges that Dudley's visit to Washington County was to procure the testimony of Allen Smith; that his evidence in relation to complainant's sayings is without truth; and that he had no knowledge of the fraud in procuring said testimony at the time he moved for a new trial.

The Bill was sanctioned by the Court, and the plaintiff in error restrained by injunction from enforcing said judgment.

Counsel for plaintiff in error excepted thereto, and assigned the same as error.

VASON & DAVIS, for plaintiff in error.

WARREN & WARREN, *contra*.

 JONES vs. ROBSON.

By the Court.—STEPHENS, J., delivering the opinion.

A Bill of Review, in order to be sustained, ought to make a case for reversing the former decree, and this Bill does not make such a case. The decree which is sought to be reversed, was founded upon an alleged contract between Mrs. Jones and Mr. Robson. We have not before us, in the present case, the proof in support of that contract, but Judge Lumpkin, in his written opinion in the former case, says, "there is a superabundance of evidence to prove this contract, and of his (Robson's) distinct and oft-repeated recognition of it." See 27 *Ga. Rep.*, 272. This Bill of Review rests upon an assault on that proof, but it touches only two points of the "superabundance" which existed. When I speak of the extent of the attack, I mean the attack as *supported by affidavits*, for it is not entitled to consideration farther than it is so supported. Round assertions, that no such contract ever was made, go for nothing, without pointing out the sources from which such *proof* is to come as would authorize the reversal of the former decree. The first point made by the Bill of Review, as supported by affidavits, is upon Mrs. Dudley, whose testimony was a part of that "superabundance" of proof on which the former decree was obtained. The case which it makes on her testimony is at most but one of *suspicion*. It may be, as stated by the commissioners who took her testimony, that she answered from a manuscript which she refused to let them see; and yet the manuscript may have been prepared by herself or by some one else under her direction, with a view not to falsehood, but to deliberation and accuracy. The further attempt to show that she was an incompetent witness on account of interest, is a failure. Leonard, in his affidavit, states that Mrs. Jones said to him, after she had got her decree, that she had consented to settle a portion of the recovery upon Mrs. Dudley, who was her daughter, but he does not state that she said this "consent" was given before Mrs. Dudley gave her testimony; and the "consent" utterly fails to come up to the standard of a *contract* conferring a legal interest. The other point made by the Bill of Review is upon some sayings of Mrs. Jones, as reported by Mrs. Owens after a lapse of seventeen years. In the first place, Mrs. Jones may have said what was not true; but in the

Baldwin vs. Walden.

see, it is very uncertain what she did say. If she had given up all to the creditors of Jones, as Mrs. reports her, her saying was inconsistent with the contract which the former decree in her favor was based; said she had given up all to Robson to protect the creditors of Jones, her saying was in perfect conformity with the contract, and is strongly corroborative of it is very uncertain which of these things she either she said either; and the doubt does not in the slightest reflection upon Mrs. Owens, who reports the transaction, in which she had no personal interest, after the lapse of time. She may have reported it faithfully to her memory, but her memory, under the circumstances, is not worth much. This Bill, so far from being a ground for reversing the former decree, does not even afford a ground for a new trial; for the point which it makes is the mere impeachment of a witness, and the sayings of Mrs. Jones only brings up contradiction, and neither of them is a good ground for reversal. We are well satisfied that this Bill ought to be dismissed.

reversed.

BALDWIN vs. WALDEN.

ought not to be granted on the ground of absent evidence, since the party fully admits all that could be proven by the evidence; nor when there is no showing of the proper diligence to

a note, put there by the maker, affords a presumption that demands in open account, existing against the party at the time, are covered by it.

from Terrill Supreme Court. Tried before the Court, at May Term, 1860.

Baldwin vs. Walden.

This was an action brought by defendant in error against Moses H. Baldwin, to recover an amount claimed to be due on a promissory note.

When the case was called for trial, defendant moved to continue the same, on a showing in writing, in substance as follows :

The note sued on was given by defendant to Walden, and payable to him only ; that at a former term of the Inferior Court, James W. Devereaux had brought suit against Walden, and garnished defendant ; defendant answered the garnishment, setting out all the items of indebtedness existing between defendant and Walden, including the note sued on ; upon which answer the Court gave judgment against defendant for the balance due, being about \$166 ; defendant settled said judgment, and surrendered all the items of indebtedness in Court to Walden ; that defendant has applied for the garnishment and answer, and all the papers connected therewith, to the Clerk of the Inferior Court, and they cannot be found after diligent search ; that he cannot go to trial without them, &c.

Plaintiff's counsel agreed to admit the amount claimed to have been paid on the garnishment, and the Court thereupon refused the motion to continue, to which defendant excepted.

Plaintiff then put in evidence the note sued on, which was payable to *him only*, in the sum of \$1,000, having a credit thereon for \$497.56, dated April 1st, 1856, and closed his case.

Francis M. Harper, introduced by defendant, testified : That plaintiff admitted that there was a credit of about \$166, paid by Baldwin on garnishment process, which Baldwin was entitled to on said note. There was other proof by defendant, going to show money paid out by him for Walden at different times—a horse sold to him, &c., which defendant claimed as part payment of said note beyond the credit of \$497.56.

The defendant having closed, his counsel requested the Court to charge the Jury : "That the mere fact of the receipt on the back of the note was no evidence of a settlement"—which charge the Court refused to give, and defendant excepted. The Court charged : "That if they believed the parties had a settlement at the time of making

ipt, then all the accounts of the parties up to the
 at settlement are presumed to be included in the
 t; and it is on defendant to show they were not;
 termining whether or not there was a settlement,
 t on the back of the note, being in the handwriting
 fendant, should be taken into consideration to es-
 it fact." To which charge defendant excepted.

R & SMITH, for plaintiff in error.

SS & DOUGLASS, *contra*.

Court.—STEPHENS, J., delivering the opinion.

hink the continuance was properly refused for
 : First, because the opposite party fully admit-
 could have been proven by the absent evidence
 een present; and second, because there was no
 t proper diligence had been used to have it pres-
 not appear but that the defendant had had am-
 got established copies of the missing garnish-
 , after they had been ascertained to be missing.
 ink the charge was correct. The credit on the
 the handwriting of the defendant, and that fact
 it was put there with his approval of its correct-
 date subsequent to all the cross claims of the
 gainst the plaintiff, and these claims were all
 open account. Is it to be supposed that a pru-
 ould pay money on his note, without having a
 f his open accounts against the holder of it?
 old cross demands against each other, prudence
 neither should pay money to the other, except
 : of a *balancing*. The credit, therefore, did
 umption that the existing cross demands were
 and that presumption ought to have prevailed,
 d.

ffirmed.

MCCAULEY vs. SHELDENS et al.

When the vendors of marble ordered from a distance, deliver it to the common carrier in pursuance of the order, or in the silence of the order on that point, in pursuance of the course of trade in the article, their part of the contract is performed, and their right of action for the price of the marble is complete, and will not be defeated by their subsequent unauthorized settlement of a policy of insurance in favor of the vendee.

Complaint in Muscogee Superior Court. Tried before Judge WOBILL, at May Term, 1859.

* Sheldens, Morgan, and Slason, shipped a lot of marble from New York to McCauley, at Columbus, and got one L. J. N. Stark, a commission merchant in New York, to have the same insured to the extent of \$1,200. When the marble reached Columbus, it was found to be considerably damaged, and McCauley refused to receive it, insisting that it was so much damaged as to require the Insurance Company to pay for it as a total loss. Stark was notified of the damage, and after some negotiation between him and the Insurance Company, he compromised the matter with them at \$600, and paid the amount over to the plaintiffs—less \$2,500 expenses of settling the claim.

Plaintiffs afterwards commenced suit against McCauley for the value of said marble, who set up in defence thereto, that said Stark compromised the claim on the Insurance Company at the instance of plaintiff, and without his authority; that said Stark ought to have compelled the Insurance Company to pay the whole amount of the risk, and not having done so, defendant is released from his liability to the plaintiff.

The Jury, after hearing the evidence and charge of the Court, found for the defendant. Whereupon, plaintiff moved for a new trial, on the following grounds, to-wit:

1st. Because the Court erred in ruling out the answers to the cross interrogatories of L. J. N. Stark, so far as the said answers referred to the said Stark having compromised the claim against the Insurance Company upon the authority of defendant.

cause the Court refused to charge the Jury as re-
y plaintiff's attorneys, that if Stark compromised
Insurance Company without authority from Mc-
hen McCauley could go upon the Insurance Com-
mis claim, and, therefore, it would be no defence in
; and upon the other hand, if McCauley did au-
ark to compromise the claim, he had not been in-

ause the Court in charging the Jury, that if the
structed Stark to insure the marble, then McCau-
equitable interest in the policy of insurance; and
3, through their agent Stark, compromised with
ance Company without the authority, then that
defence to this case.

and 6th. Because the verdict was contrary to
ie weight of evidence and the Law.

rt granted a new trial on the ground that his
ve stated, was erroneous as well as his refusal to
he request of plaintiff's attorney; and that the
contrary to evidence—there being no evidence in
e verdict, except the evidence upon which the
e stated was founded. To which ruling the de-
pcted.

r plaintiff in error.

contra.

urt.—STEPHENS, J., delivering the opinion.

the new trial was properly granted. When the
delivered the marble to the common carrier in
what was or must have been contemplated by
their part of the contract was performed, and
f action for the price of the marble was com-
omplaint which McCauley has against them on
eir alleged subsequent unauthorized interfer-
policy of insurance, if it be actionable at all,
subject of an action on the case sounding in
pleadable as a sett-off, nor available in any
ence to their action against him for the price

Bryan vs. Walton.

of the marble. He is not without his remedy for any improper settlement of his policy of insurance. If Stark was not his agent, it is not settled, and he may still hold the insurers responsible on it. If Stark was his agent and acted improperly, his remedy is against his agent; and if Stark was his agent and acted properly, he has no remedy only because he has received no injury.

Judgment affirmed

BRYAN vs. WALTON.

A writ of error will be dismissed unless prosecuted by the plaintiff in error at the term to which it is returnable by Law, or there be Providential cause for the failure; and the term to which it is returnable by Law, is the first which occurs after the bill of exceptions is filed in the Clerk's office below, unless such first term opens before the expiration of fifteen days from such filing.

Trover, in Houston Superior Court. Decided by Judge LOVE, at April Term, 1859.

It appears from the record in this case, that the Court below having, at the above named term of said Court, refused to grant a new trial at the instance of the plaintiff in error; his counsel sued out a bill of exceptions, and had the same certified by the Judge on the 4th day of June thereafter, the certificate directing the clerk to transmit the record of the case "to the Macon Term of the second district of the Supreme Court." Service of the Bill of exceptions was acknowledged, by counsel for defendant in error, on the 9th day of June, 1859, and the said bill, with the entry of service thereon, was filed in the clerk's office two days thereafter, to-wit, June 11th, with instructions to the clerk to send the

the case to the Macon January Term, 1860, of the same Court, which was accordingly done. It further stated that the said April Term of Houston Superior Court was held on the 6th day of May, 1859.

The case was called in the Supreme Court on the 1st of the January Term, 1860, counsel for defendant in error brought the foregoing facts to the attention of the Court and moved to dismiss the writ of error on the ground that a bill of exceptions was filed in the clerk's office more than ten days prior to the June Term, 1859, and that the case should have been brought to that term of the Court.

WILLIAMS, for the motion.

WILLIAMS, and S. T. BAILEY, *contra*.

Court—STEPHENS, J., delivering the opinion.

The Constitution of this State declares that the Supreme Court "shall, at each session in each district, finally determine each and every case on the docket of such Court, at the first term after such writ of error is brought; and in case the plaintiff in error in any such case is not prepared, at such first term of such Court to bring the case, to prosecute the same, unless precluded by some accidental cause from such prosecution, it shall be removed from the docket, and the judgment below shall stand." The present practice in the Superior, Inferior and Justices' Courts, of returning cases to one term and then bringing them at the next, was prevailing when this provision was adopted, and the intention of the framers was to change that practice as to cases in the Supreme Court, by requiring them to be decided at the first term to which they were brought, or to say, the term to which they might be returned. The law regulating the manner of bringing cases to the Supreme Court, and to prevent any departure from the same for Providential cause. The Act of 1856, regulating the manner of taking cases to the Supreme Court, required a writ of error to be returned to the first term occurring after the bill of exceptions is filed in the clerk's

Bostick vs. Hardy.

office below, unless that term opens before the expiration of fifteen days from such filing. In this case, the bill of exceptions was filed on the 11th day of June, 1859, and the first term of this Court occurring thereafter, opened on the 27th day of the same month—not before, but *after* the expiration of fifteen days from the filing. That June term, therefore, was the term to which this writ of error was returnable by law, and at which the judgment of the Court below stood affirmed by the Constitution, the plaintiff in error not having “prosecuted” the case at that term, and there having been no Providential cause for his failure to do so. It was suggested that the case failed to be here at that term, through the fault of the clerk below, and not through any fault of the plaintiff in error. The *case* was here by law, and the appropriate prosecution of it by the plaintiff in error, would have been an application for process to compel the clerk below to do his duty of sending the *papers* here. It is with extreme reluctance that we refuse to hear a case on its merits, but in this one, the Judgment of the Court below stands affirmed by the Constitution, and we have no power to entertain the writ of error.

Writ of error dismissed.

BOSTICK vs. HARDY.

A payment to an agent by releasing his personal debt, is not a payment to the principal.

Complaint, from Sumter county. Tried before Judge ALLEN, at April Term, 1860.

The plaintiff in error brought this action to recover the sum of \$850, alleged to be the balance due him on an account for a negro slave sold by plaintiff to defendant.

the trial, the plaintiff introduced the defendant, Hardy, testified, that on the 25th day of May, 1859, he, at, bought of William Spencer, as agent of plaintiff, woman named Sarah; that Spencer made him a bill as agent of plaintiff, under a power shown in a letter to plaintiff to Spencer—which letter was also put in.

Defendant further testified, that he agreed to \$400 for the slave, \$400 of this was paid in cash, and put it in an order on Sims & Keely, which was taken and was soon paid, and the balance, viz: about \$70 amount which defendant had on Spencer. The \$400 paid by defendant by giving his note, which Spendiately got the money on at the Savannah Bank.

Does not know who the note was payable to, whether to defendant or plaintiff. A day or two after the trade was made, Coker, the Bank agent, brought him the note, saying it was not written right in some way; witness took up the note and gave another, written as the agent desired. He does not remember that the difficulty was that the note was not in the order of the plaintiff.

After the trial had then closed, counsel for defendant moved for a new trial, which motion was sustained by the Court, and the case was remanded for a new trial.

& HAWKINS, for plaintiff in error.

JOHN H. HUGHES, for defendant.

Court.—STEPHENS, J., delivering the opinion.

The suit was awarded in this case when the idea that the plaintiff's own proof showed that he had been fully paid, and that the payment of the seventy dollars to the agent of the plaintiff was simply acquitting the agent of a debt of that amount which he owed to the defendant, was no payment to the plaintiff. A payment can not be made to an agent who is not authorized to receive such by acquittances of the agent's personal liability.

The judgment is reversed.

CLECKLEY vs. HULL et al.

D. owes S. a debt upon his security. D. gives S. a mortgage on three negroes as further security for the debt. C., ignorant of the mortgage lien, buys the three negroes of D. at a full price. S., the creditor, with a knowledge of the sale, gives indulgence to D. from year to year, for three years, until D., who was solvent at the time the mortgage matured, had become insolvent when it was foreclosed. S. attempts to enforce the lien for his debt against the mortgage property. *Held*, That C. is entitled to be protected in his purchase, against the mortgage lien.

In Equity, in Muscogee Superior Court. Decision on demurrer by Judge WORRILL, at November Term, 1859.

This was a bill filed by Hervey M. Cleckley, against John R. Hull and Alexander Sheppard. The bill alleges, in substance, that some four years prior to the time of the filing of this bill, complainant purchased from one Oliver Danforth, a negro woman and child, paying Danforth for the same the sum of thirteen hundred and fifty dollars; that more than three years after said purchase, during all of which time complainant had peaceable possession of said negroes, he was, for the first time, informed that Alexander Sheppard held a mortgage thereon, executed by Danforth, prior to the sale made as above stated, to complainant, which mortgage was given for the better securing a debt owing by Danforth to Sheppard, amounting to about twelve hundred dollars, and to which (said debt being a promissory note) John R. Hull was security.

The bill further alleges, that Sheppard had foreclosed his mortgage and ordered a levy and sale of said negroes, and that the Sheriff of Muscogee county, under the mortgage *fi. fa.*, seized and levied upon said negroes, when complainant interposed his claim, and on the trial of said claim, it was proved and admitted that complainant was an innocent purchaser for valuable and full consideration, and that he had held peaceable possession of said negroes for more than three years, without notice or knowledge of any incumbrance on Danforth's title thereto, by mortgage, judgment, or other lien, and complainant asked the Court to charge the Jury that such possession protected his title against the mortgage lien in this case.

Cleckley vs. Hull et al.

rial was had in the Inferior Court, and counsel on es having announced, during the trial, that there : an appeal to let the question be decided by the Court as it might; said Court stopped further ar- s unnecessary, and decided the point of Law against unt, who thereupon confessed judgment to the plain- ving the right of appeal. That complainant being as to what was necessary to be done to entitle him is case tried on the Appeal, relied entirely upon his That Mr. Halderness, his leading counsel, and Mr. assistant counsel, were both unwell at the time of sion aforesaid, although present in Court, and im- thereafter, they were both quite ill for sometime, ed to their houses and unable to attend to any al business. . That complainant called at their hin a day or two after said trial, to ascertain if l had been entered, and not finding either of them ; knowing of their illness, he supposed that the mat- en attended to; and complainant avers that said ld have been legally and properly entered, but ess of his counsel; and that both his counsel have e, in consequence of their sickness, to prepare and ill, until this term (the week before the sitting of Term, 1859, of Muscogee Superior Court.) And, complainant has been prevented from having a Law, and seeks the aid of a Court of Equity to against irreparable injury.

Further states, that at the time Danforth sold said complainant, and for two or three years there- s solvent and in good credit, doing an extensive ss in the city of Columbus, and that if Sheppard and required the payment of his debt against 10 same would have been paid, and paid without the negroes sold by Danforth to complainant.—

of requiring payment of said debt at or soon urity, Sheppard granted further time and indul- nforth, and agreed, upon a consideration then , that he would extend indulgence for twelve at the end of that time, Sheppard gave another ance for a consideration received from Danforth, t was extended a third year on like considera- said indulgence and contracts were given and

Oleekley vs. Hull et al.

made by Sheppard, without the knowledge or consent of complainant, notwithstanding Sheppard had knowledge of the purchase of said negroes by complainant, and that he had paid for the same, and had possession thereof. And Sheppard thus granted indulgence, and delayed enforcing or requiring the payment of his debt, until Danforth failed, when he proceeded to foreclose his mortgage on the negroes thus bought years before from Danforth, and bought without knowledge of Sheppard's mortgage. Then Danforth is now utterly and totally insolvent, and has been ever since complainant had notice of said mortgage.

The bill further states, that Hull was Danforth's security on the note held by Sheppard, and for the better securing of which the mortgage was executed; and that he, upon the foreclosure of Sheppard's mortgage, came forward and paid said note in full to Sheppard, who transferred and delivered the same to Hull, together with the mortgage; and that the same is now held and controlled by him and kept open for his benefit.

The bill prays that an injunction issue to sustain defendants from issuing said mortgage *fi. fa.* against said negroes; that said negroes be declared and deemed exempt and discharged from said mortgage, and all the heirs and incumbrances growing thereout, &c.

Defendants demurred to this bill for want of Equity.

After argument, the Court sustained the demurrer and dismissed the bill, and counsel for complainant excepted.

WILEY WILLIAMS and DOUGHERTY, for plaintiff in error.

R. W. DENTON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Was there equity in complainant's Bill? We think so. Buying the judgment debtor, Danforth's property as he did, he is an innocent purchaser, and as such, is entitled to the same protection that a security would be. Sheppard, with a full knowledge of this fact, extended indulgence from year to year, for three years, to Danforth, for a consideration paid to him annually in advance, until Danforth, who was

Howard et al. vs. Marine Bank of Georgia et al.

the maturity of the mortgage debt, became insolvent then the attempt is made to subject the mortgage to the payment of the debt.

facts, alleged in the Bill, are true, the negroes Cleckley of Danforth, are discharged from the lien. And as to Hull, he stands in no better situation than Sheppard. Under no circumstances is he to control this mortgage security. If he voluntarily left of his principal, from which he was legally released he consented to the indulgence given to Danforth his own fault. And if he did consent, it would be prudent in him to look to the mortgage property for payment as it would be in Sheppard to seek to make the first instance. *5 page Rep. 614.*

as we do, that there is equity in the Bill, we are very strenuous as to the excuse rendered by them for not entering the appeal in the Inferior Court.

was sick at the time the judgment was rendered, Court. Both of them were stricken down by disaster, and kept in bed, unable to attend to business four days had expired. Complainant called at not knowing of their sickness; but not seeing it for granted, that the business had been at-

t al vs. MARINE BANK OF GEORGIA et al.

erial allegations in a Bill, and the statements upon which the Bill is based, are fully met and denied by the answer, and the legal reason for retaining the injunction, it will be dissolved.

from Muscogee county. Decision by Judge
by Term, 1859.

Howard et al. vs. Marine Bank of Georgia et al.

This Bill was filed by the plaintiffs in error, against the defendants, to enjoin a suit at Law, in favor of the Marine Bank against the plaintiffs in error, as endorers of a certain draft.

The complainants alleged, that about the first of October, 1855, they, John W. Howard, Henry T. Hall, and John C. Reese, in connection with Milledge McKinney, who was then book-keeper in the Agency of the Marine Bank, at Columbus, of which Richard Patten was then agent, formed a company under the name of the Union Dray-Line Company, for the purpose of carrying on the business of common carriers; that said Company put in a cash capital of \$3,000, and appointed the said McKinney to act as Treasurer, and said John W. Howard to act as the General Agent thereof. That McKinney opened an account for said Company with the Agency of the Marine Bank, and drew all checks for it, on account of the said Company. After the Company organized, they purchased some forty or forty-five mules, drays, &c., and commenced the business of common carriers, and did a large business—a profitable one, as complainants supposed. That all the receipts of the business, amounting to some forty or fifty thousand dollars, were paid over to said Treasurer, and by him deposited in said Marine Bank, and by him checked out from time to time. A part of the mules were purchased on credit and paid for by bills drawn by said Howard, as Agent of the Company, and deposited and discounted in the said Agency of the Marine Bank, and afterwards paid off by funds deposited by said Treasurer to their credit. That said McKinney continued to keep said account in the said Bank Agency, of which he was the chief book-keeper; and that without the knowledge, consent, or privity of complainants, he overchecked said account as he informed them in 1856, but that they could not understand why it was done; that said McKinney, by the advice of the said Patten, agent, called on complainants and solicited them to endorse the draft of John W. Howard, agent, for \$10,000 at 45 days, in order, as McKinney stated, to make good the account of said Company at said Bank; that the complainants, Reese and Hall, expressly refused to do so, and then consented, upon the promise of McKinney, who was then and there an officer of said Bank, and who had been sent to them by said Patten, agent, and who, in taking said draft.

Howard et al. vs. Marine Bank of Georgia et al.

; by the authority of said Bank, that the endors-
not be looked to, and should never hear anything
aft, but that it would be paid out of the assets of
Dray Line Company, of which there was then an
unt to pay said draft, the particulars of which as-
value, &c., were well known to said Patten, agent.
plainants charge, that it was only on the assur-
the sum of \$10,000 was due to the Marine Bank
company, and that they would not be looked to in-
on said draft, that they consented to endorse the
ther, that they had just ascertained that this
obtained from them by misrepresentation; that
in fact, nothing at the time but a small balance
ndred dollars due to the said Bank by said Com-
was paid off before the commencement of the
Bank; and that their account was balanced in
by the discounting a note or bill of exchange
with said Bank, and for which said Union Dray
any was in no way liable, and with which said
nd no privity, as the said Patten, agent, well
drew the bill they do not know, not being ac-
h the particulars, but charge that the same was
l McKinney without the knowledge or consent
Company, and that said Bank knew this to be
rther alleged, that the assets of the said Com-
faith of which they agreed to become liable on
ow sued on, have been applied, by said McKin-
payment of other debts to said Bank, the said
nowing when said payments were made, that
ade with the proceeds of the said Company;
hat said endorsements were made on the faith
, and the promise of said McKinney to pay the
000, now in suit.

tion having been granted, the defendants filed
admitting all the facts as to the organization
Dray Line Company, the appointment of cer-
the keeping of their account in said Bank
ver-drawing by their Treasurer, and the taking
settle the same; but they deny all the other
instances charged, and upon which the equity
is based.

cnies that said McKinney made any arrange-

ments with complainants respecting said draft for or in account of said Bank, or that he was authorized so to do.—McKinney, on his part, answers in detail all the charges in the bill, and, especially denies that when he asked complainants to endorse said draft, he promised them it should not come against them, or that they should not hear of it again. He says that the said Company was indebted to the Bank at that time, to the amount of said draft on account of overdraws. That when he went to complainants to get them to endorse the draft, he did so, not at the instance or with the knowledge of said Patten, Agent, but as a mode of having the Company's account with the Bank settled, the said Patten, agent, requiring such settlement to be made. He denies any wrongful appropriation of the assets in his hands, and all fraud, concealment, or misrepresentation.

Defendants' counsel, on the coming in of these answers, moved to dissolve the injunction, on the ground that said answers denied the equity in the bill.

The Court sustained the motion, dissolved the injunction, and complainants excepted.

R. J. MOSES, for plaintiff in error.

DOUGHERTY, for defendant.

By the Court.—LUMPKIN, J., delivering the opinion.

We think the Court was right in dissolving the injunction in this case.

It is conceded that all the statements in the Bill, as to the declarations and promises of Patten, made to the complainants, are fully met and denied. And while it is literally true, that the account due the Bank was nearly balanced by the Bill of Exchange drawn in May, 1856, still the actual indebtedness of the Company to the Bank was not discharged by that transaction. It was no payment by the Company. It is not pretended that their funds were appropriated at that time for that purpose.

The answer of Milledge McKinney, who was the book-keeper of the Bank, and the Treasurer of the Union Dry Line Company, and who kept their accounts, denies, most

al. vs. vs. The Mayor and Council of the City of Columbus.

every allegation in the Bill. His answer can be trial of the Common Law action, and Patten is it witness for the complainants. There is no reason, why the injunction should be retained.

vs. THE MAYOR AND COUNCIL OF THE CITY OF COLUMBUS.

ure has the power to create, corporations for the government to enlarge or diminish their powers from time to time, at its may authorize the imposition of taxes to construct a railroad, the city and extending into the interior— either into the interior or an adjacent State.

re, in 1858, passed an Act to make valid and binding the theretofore made by the Mayor and Council of the City of the stock of the Mobile and Girard Railroad Company, and to the Montgomery & West Point Railroad Company; and to binding the bonds issued by the Mayor and Council to said yment of the same; and to declare and make valid the ordinance passed by said Mayor and Council, authorizing the collection for the payment of interest accruing on said bonds; and to Mayor and Council of said city to levy and collect a tax for the purpose of paying the principal and interest of said bonds; and the collection of taxes for the payment of the principal of all legal contracts which have been, or may thereafter be incorporated. *Held*, 1. That said legislative act gave validity to the proceedings of the city and its agents, whether they were or not. 2. That such act was not inoperative as being repugnant or unconstitutional. 3. That the city was thereby empowered to collect the taxes which they are now seeking to enforce.

in Muscogee Superior Court. Decision by the Court, at November Term, 1859.

was issued by authority of the Mayor and

Bass et al. vs. The Mayor and Council of the City of Columbus.

Council of the City of Columbus, directed to the Marshal of said city, commanding him of the goods and chattels, lands and tenements of Bass & Cleghorn, of the Perry House, to levy and sell so much as would be sufficient to raise the sum of four hundred and seventeen dollars and fifty cents, being the amount of the corporation and railroad tax assessed against them for the year 1859, execution dated 15th April, 1859.

By virtue of said execution, the Marshal levied upon city lots Nos. 219, 220, 221, and 222, situated on Bryan and Oglethorpe Streets, said lots known as the premises on which the Perry House is situated; also, on lots 227, 228, 229 and 230, on which is situated the Oglethorpe House.

To this levy Bass & Cleghorn filed an affidavit of illegality, on the following grounds, to wit:

1st. That a tax is levied for the purpose of paying bonds issued by the Mayor and Council of the City of Columbus for the building of the Mobile & Girard Railroad, and said Council had no authority to levy such a tax according to Law.

2d. That the Mayor and Council of the City of Columbus have no authority to levy and collect a tax to pay the bonds issued for stock for the purpose of building the Mobile & Girard Railroad, said Railroad being without the limits of the State of Georgia, to wit: in the State of Alabama; and that said tax *fi. fas.* are for this purpose.

3d. That said Mayor and Council of the City of Columbus have no authority to levy and collect a tax for the purpose of paying the bonds of said City Council, issued to the Montgomery & West Point Railroad Company—the said company being a foreign corporation, and without the limits of said State of Georgia, and without the limits of said City of Columbus; and that said tax *fi. fa.* is in part for said purpose.

4th. That said tax *fi. fa.* is issued for the purpose of collecting a tax to pay for stock, or bonds issued for stock, *iz.* the Mobile & Girard Railroad Company, corporation chartered and wholly existing in the State of Alabama, and that said tax *fi. fa.* is proceeding for said purpose without the authority of Law.

5th. That said *fi. fa.* is illegal in this: That the ~~causes~~ of the City of Columbus instructed said Mayor and Council

et al. vs. The Mayor and Council of the City of Columbus.

be for stock in the Mobile & Girard Railroad, and Montgomery & West Point Railroad, under a contract made and executed by said Companies, that they, nor either of them, should ever hereafter, by virtue of any power which said Company may obtain from either the Council of the City of Columbus or the Legislature of Georgia, ever to extend the track of said Road to any certain point, or in any manner connect the track of said Road within the corporate limits of said city, which was made and executed before said subscriptions were made by said Companies, and that said Companies have violated said contract and agreement, by proceeding to connect said tracks, to the great and irreparable injury of affiants without their consent, and against their protest—thus compelling affiants to pay money which brings certain ruin upon them, contrary to Law and contrary to said contract. That said *fi. fa.* is proceeding illegally in this: That in 1857, affiants paid this railroad tax, which, in 1858, the Supreme Court declared illegally collected. Affiants repeatedly, during the year 1858, both before and after said decision, offered and tendered the amount of said tax, which was illegally assessed against them, if said Mayor and Council would deduct the amount illegally collected of them in 1857, which said Mayor and Council refused to do.

said tax *fi. fa.* is proceeding illegally in this: That said *fi. fa.* is based upon an Act of the Legislature of Georgia, passed and enacted on the 11th day of December, 1858, which Act is entitled "An Act to make valid and binding the subscriptions of stock in the Mobile & Girard Railroad and the Montgomery & West Point Railroad Companies, made by the Mayor and Council of the City of Columbus, to certain Railroad Companies;" which affiants do not believe to be unconstitutional and void. That said tax *fi. fa.* is proceeding illegally in this: That the subscriptions of stock in the Mobile & Girard Railroad and the Montgomery & West Point Railroad Companies, which said *fi. fa.* is levied to pay, was made under no contract and agreement which have been violated; that said subscriptions are not binding upon the tax affiants, and affiants are advised and believe.

said tax *fi. fa.* is proceeding illegally in this: That said Mayor and Council are indebted, and were from the year 1857, to affiants a large sum of money,

Bass et al. vs. The Mayor and Council of the City of Columbus.

illegally collected for that year on railroad tax for the Mobile & Girard Railroad which said Mayor and Council refused to allow as an offset to affiants, affiants offering to pay to balance at least twelve months previous to the issuing of said tax.

After argument, it appearing to the Court that the grounds stated in said affidavits of illegality are insufficient: It is therefore ordered that said *fi. fas.* do proceed.

To which decision counsel for Bass & Cleghorn excepted, and assigned the same as error.

THORNTON & THOMAS, BLANDFORD & CRAWFORD, for plaintiffs in error.

JNO. PRABODY, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

On the 11th of December, 1858, the Legislature passed an Act to make valid and binding the subscriptions theretofore made by the Mayor and Council of the City of Columbus to the stock of the Mobile & Girard Railroad Company, and to the stock of the Montgomery and West Point Railroad Company; and to make valid and binding the bonds issued by the said Mayor and Council, to said companies in payment of the same; and to declare and make valid the ordinances theretofore passed by said Mayor and Council, authorizing the collection of taxes for the payment of interest accruing on said bonds; and to authorize the Mayor and Council of said city to levy and collect a tax annually for the purpose of paying the principal and interest on said bonds; and to authorize the collection of taxes for the payment of the principal and interest of all legal contracts which have been or may thereafter be made by said corporation.

And the Act reads, that "Whereas, the Mayor and Council of the city of Columbus in public meeting assembled have acknowledged the validity of the contracts made before that time, by which said bonds and coupons were issued, and have recognized the obligation which rests upon said corporation to pay the principal and interest of said

et al. vs. The Mayor and Council of the City of Columbus.

the same may become due."—*Pamphlet Acts of*
31.

parent, then, that if the Act is valid and constitu-
plaintiffs in error have no case. Is the Act val-
stitutional?

e is important from the magnitude of the princi-
ed, and has received at our hands the most delib-
patient investigation. Did opportunity permit, it
be unprofitable to examine the power of the State
orporations, and the powers that may be extended
We think, however, that the principles regulating
lling the questions debated in this case, may be
in a narrow range.

ions in Georgia exist only by Statute; and it can
se those powers expressly granted and which re-
cessary implication. In this case there is no
e amplitude of the grant.

the construction of charters never confine them-
letter, but whatever is necessary and proper to
xecution the power conferred is always conce-
the power attempted to be exercised is not im-
e contrary, it is expressly given.

purposes have been divided into direct, such as
tions, the construction of streets, supplying the
ater, &c.; and indirect, such as canal and rail-
ements, by which the commerce and business,
improvement and prosperity of the place, is
And one of these objects is as legitimate as the
ere anything illegal or against common right
engage in such enterprises? With the lights
before us, it is useless to argue in favor of
ition; and if a majority of the community to
e desirous of doing this, and the Legislature
em the power, upon what principle shall the
and arrest such works? Shall it require
as consent of the inhabitants of a town before
hall be exercised? It would annihilate the
nd if a number less than the whole shall suf-
the Legislature shall decide upon the *plus* or
It has been wisely bestowed upon the major-

gued that these corporate powers, if not con-

Bass et al. vs. The Mayor and Council of the City of Columbus.

finned to the limits of the corporation, should certainly not be extended to corporations situate outside of the State. Did not the State itself extend its own railroad beyond its own limits? And why may not a municipal corporation do this, in order to make the outlay profitable? What signifies it, whether a road beginning at the city of Columbus is extended into the interior of Alabama or Georgia? The only question is, which will bring the largest amount of trade and travel to the city of Columbus. Suppose the city, for the promotion of the health of the city, should determine to supply it with water, and the only supply was from the highlands on the other side of the Chattahoochee River, would there be anything immoral or illegal in making a contract for this purpose? The interest of the corporation is the only true test of the corporate character of the act. Suppose the Legislature were to authorize the city of Savannah to subscribe for stock to incorporate a company to establish a direct trade between Savannah and Liverpool, Canton or Calcutta, I am not prepared to say that such Act would be void.

The operations of the Mobile & Girard and Montgomery & West Point Railroads may be without the State even; the benefits are experienced within the city of Columbus. Suppose there was an obstruction in the Chattahoochee River which impeded its navigation and cut off the commerce of Columbus; and further, that the River lay within the limits of Alabama: might not the city by the authority of Legislature raise, by taxation, a fund to remove the impediment? The work might be done beyond the limits of the State—the consequences or effects of it would be felt throughout the heart of Columbus, and in every ward of the city.

And who is the proper judge, whether any proposed measure will conduce to the public interest of the city? Not the Courts, surely, nor the majority of the people acting through their Representatives in General Assembly; but a majority of the corporation, acting under the sanction of the Legislature. The people of each community or municipality know what is best for them.

But it is said that the Act of 1858 is retroactive, and is not unconstitutional, is opposed to the principles of natural justice and free government, and is therefore void.

There is great difficulty in determining what are the prin-

et al. vs. The Mayor and Council of the City of Columbus.

natural justice, and that which tends to undermine
 orists may suppose to be the fundamental princi-
 e social compact; and I am aware that it has been
 by Judges of Courts of the highest respectability,
 active provisions which take away or impair vested
 inoperative. But then, on the other hand, there
 nting the names of the most distinguished jurists
 of the highest authority, who deny to the judi-
 right to treat retrospective acts as void. *Calder*
Dallas, 386; *Satterlee vs. Matthewson*, 2 *Peters*,
on vs. Huger, 1 *Bay*, 179; *Fletcher vs. Peck*, 6
 ; *King vs. Dedham*, *Burk* 15, *Mass. Rep.*, 447;
tetson, 2 *Mass. Rep.*, 143; *Society for the Propa-*
e Gospel vs. Wheeler, 2 *Gallis*, 105; *Cochran vs.*
y, 20 *Wendell*, 365; *Senator Buplank's Opin-*
vs. Palmer, 1 *Hill*, 324; *Charles River Bridge*
Bridge, 11 *Peters*, 420; *American Jurist* for
 13, p. 277; *Allen vs. McKeen*, 10 *American Ju-*
 97; *Barrick vs. Smith*, 5 *Paige Ch. Rep.* 157;
Christians Notes, 91.

esent case, we must say that we see nothing in
 unjust or oppressive as to make it our duty to
 extreme, doubtful and dangerous power of pro-
 void. Our cities all over the State and coun-
 quently contributed, in their corporate capaci-
 s, canals, and other improvements, without ex-
 or being suspected of oppressing their commu-
 n invading unjustly any salutary principle of the
 . And we cannot shut our eyes to the fact,
 their prosperity depends upon the extent and
 heir intercourse with the interior as well as
 nd foreign places. True, these schemes some-
 sionary, and thus bring loss upon the property
 that must always be a question for the corpo-
 nd not for the Court. There the battle must
 wween the sanguine and hopeful on the one
 saturnine and contras on the other. One de-
 majority, the minority must submit, provided
 es not transcend its chartered powers. From
 of society to the present time, the warfare
 essantly between majorities and minorities as
 ts and their rights. The levying and collect-

Bass et al. vs. The Mayor and Council of the City of Columbus.

ing of taxes is always a compulsory act of the majority and generally very ungraciously submitted to by the minority. The present case is not unlike thousands that have preceded it, and there is nothing new under the sun.

But it is said, that if the proceedings of the Council were void under the previous Act of 1857, they cannot be rendered effectual by a subsequent confirmatory Act of the Legislature. But there can be no difficulty in the present case. The city asks for legislative interference to give *validity* to its previous acts, and not to perpetuate their *infirmity*. To comply with the wishes of the city was the object of the Legislature in passing the Act of 1858, not to defeat said wishes. The end of all confirmatory laws, so far as they are retroactive, is to give effect to acts which were before inoperative. Our Digests abound with Statutes confirming the void acts, of public officers and others occupying some fiduciary relation and that such is the proper effect of such laws, was adjudged by the Supreme Court of the United States in the case of *Wilkinson vs. Leland*, 2 *Peters*, 662.

Believing, then, as we do, that the judiciary is not the guardian of the Legislature, and that it possesses no *veto* powers over its constitutional acts, we cannot disregard and thrust aside the Act of 1858, merely because it is retroactive in its purposes and effect.

As to the other minor questions made in the record, they were abandoned in the argument. Had they been insisted on, there is none of them entitled to receive our continuance and favor.

We affirm the judgment of the Circuit Court.

McDaniel, *alias* Hickey vs. The State of Georgia.

MC DANIEL *alias* HICKEY vs. THE STATE OF GEORGIA.

cannot conscientiously adopt the Law as it is given to them in the Court, it is not only their right, but their duty, to render a verdict according to the opinion which *they* entertain of the Law; and they would be so instructed by the Court when requested to do so.

Verdict for Shooting, in Quitman Superior Court. Fore Judge PERKINS, at May Adjourned Term,

Defendant in error was indicted and put on trial for the murder of one Richard Gay with a pistol.

The first panel of Jurors, consisting of forty-eight, having been exhausted before the Jury to try the case was made up, it was agreed that twenty-four more *tales* Jurors should be summoned, which was done. The Court announced the result of these last, that prejudice or bias for or against the defendant, as used in the Statute, meant prejudice or bias in a particular case before the Court.

In selecting the Jury, C. McKinney, one of the *tales* Jurors called, in answer to the questions prescribed by the Court, stated, that he had been acquainted with the prisoner for twenty-five years, and that he had a prejudice against his conduct; but being restricted by the Court to answer only the first of the questions propounded, was pronounced competent and put upon the prisoner. He was then referred to the Jury, and proved the statement made as aforesaid; the Court held the Juror competent.

The Juror, Harrison, answering in effect the same questions, so declared competent.

Having been empanelled, the only evidence in the case was that of Richard Gay, who testified

that he went to the Court Ground on the first Saturday morning before he had business; when he got there, the defendant and a man named Ussory were in the piazza talking. He asked him what he was going to do with the prisoner and he said he was going to have them ironed, and walked into the Court Room; in a few minutes.

McDaniel alias Hickey vs. The State of Georgia.

walked out and had a settlement with Wilkins; was not there exceeding half an hour; Court adjourned; the defendant was missing; no one knew where he had gone; witness started on to the shop, and was attacked by a dog that rushed out of the bushes at witness; after fighting him awhile, the dog went back the way he came; witness walked on a piece, and was either hailed, or whether it was setting on the dog, witness did not know; it was behind him; then thought it was some one hailing him; since thought it was setting on the dog; witness turned on the right, and as he turned half around, the prisoner was standing in the road bare-headed, with a pistol presented, and fired it; witness was doing nothing to the prisoner; did not know he was there; prisoner fired at witness, as he thought; it was in this county; thought at the time it was about forty yards; that would cover the distance; was going to James Cole's shop; prisoner raised the pistol again, and he knew it was a repeater; he tried it as much as twice; but if the cap bursted or the hammer fell, he did not know it; continued to set the dog on witness; walked off about fifteen steps before he looked around; when he looked around he was advancing with the pistol in front of him; the dog had stopped; walked then; when he looked around, prisoner and dog both had stopped; bushes intervened; thought he would go to Cole's and get a gun and come back and make himself even with him; Cole had no gun; Shirley had one, but no shot; then determined to go and take a warrant for him, which he did. This is about what transpired.

The Jury returned a verdict, finding the "prisoner guilty of the charge as stated in the Bill of Indictment."

Council for defendant moved for a new trial on the following grounds:

1st. Because the Court erred in announcing to the second panel of twenty-four Jurors, that prejudice, as used in the Statute, meant prejudice or bias for or against the accused in the particular case then before the Court.

2d. That the Court erred in declaring the Jurors, ~~McKinney~~ and Harrison, competent to try the case.

3d. That the Court erred in refusing to charge the ~~Jury~~ as requested: "That they were the judges of the ~~Law and~~ facts, and were bound under their oaths as Jurors ~~in this~~ case, to decide the Law according to their own ~~opinions~~ of

McDaniel *alias* Hickey *vs.* The State of Georgia.

7, although they may differ with the Court in its
o them as to the Law."

That the Court erred in refusing to charge the Jury,
sted by prisoner's counsel: "That if the Jury be-
m the testimony that the accused was guilty of the
with intent to murder, he is not guilty under the
hooting at another person, and is entitled to a ver-
quittal."

hat the Court erred in refusing to charge as re-
"That if the Jury believe from the evidence that
did shoot off a pistol at Richard Gay, still, they
d the prisoner guilty of the offence with which he
ged unless the State went further and proved that
was loaded with powder and ball, or powder and
ith ball, and shot.

cause the Court refused to charge the construc-
supreme Court had put upon the Act of 1856, in
f *Allen vs. The State*, in 28 *Geo. Rep.*, p. 473,
governing and controlling this case—counsel for
having handed the case to the Court with the re-
charge.

at the verdict was without sufficient evidence to
and contrary to Law and the evidence.

rt refused the motion for a new trial, and counsel
nt excepted.

nd WORRILL, for plaintiff in error.

L BAILY, *contra*.

urt.—LUMPKIN, J., delivering the opinion.

are not prepared to endorse the opinion express-
Court in this case, that prejudice or bias for or
accused, as used in the Statute, means prejudice
e particular case before the Court, but, on the
newhat doubt the propriety of so restricting the
the Code, shall forbear so to adjudge this point.
f the Law are, prejudice or bias—not against
ue, but against the prisoner at the Bar. And
imposed by the presiding Judge is an interpo-

McDaniel *alias* Hickey *vs.* The State of Georgia.

lation certainly not warranted by the terms of the Act, and we are very much inclined to think, equally at variance with the philosophy of the rule.

The Court was requested to charge the Jury, that they were the judges of the Law and facts, and were bound under their oaths as jurors in this case, to decide the Law according to their own opinions of the Law, although they may differ from the Court, in its charge to them as to the Law.

The Jury being constituted by the Code the judges of the Law as well as of the facts, in a criminal case, we re-affirm emphatically the doctrine laid down in *Keener vs. The State*, 18 *Geo. Rep.*, 194; and this tribunal must be re-modelled, or the Law changed, before one jot or tittle of the principles there stated will be abated; and that it is, that while it is the duty of the Jury to listen with that respect which is so eminently proper to the Law as expounded by the Court, and to adopt it, provided they can conscientiously do so, still, if after all this, it is their misfortune to differ conscientiously from the Court, it is not only their right, but their duty, to find a verdict according to the opinion which *they* entertain of the Law. And instead of being guilty of perjury in doing so, they *are* guilty of perjury if they do not. For, in this case, their finding is not *their* verdict.

A verdict includes both the Law and the facts; and it must not be made up of the Judge's view of the Law, about which they differ from the Court, and *theirs* as to the facts only; it must be wholly theirs. And this must necessarily be so. If the Jury differ from the Court in civil cases, as to the Law, the Judge may grant a new trial, *toties quoties*, and thereby constrain them to adopt his direction or opinion. Not so, however, in criminal cases. They return a verdict directly contrary to his charge—in the very teeth of it—in favor of the accused, and laugh in the face of his Honor, and the Court is impotent to coerce them into conformity.

We do not think counsel for the defendant was entitled to the other instructions asked.

JOHNSON vs. JOHNSON.

ed by the debtor, or his agent, to the creditor, in discharge of a debt, cannot, without the consent of the debtor, be applied to any

ending legal testimony is excluded by the Court, yet if consideration do, it would not change the result—it is no ground for granting

ial, from Decatur county. Tried before Judge
tober Term, 1859.

ntiff in error brought suit, by attachment, to recover defendant \$300, alleged to have been paid by plaintiff for defendant, on a certain promissory note. In evidence, the plaintiff submitted proof as to his being the owner of said note, and the taking up of the note by plaintiff for security, and rested his case. The note was given by one Fillyaw, and was in the hands of one defendant on for collection, at the time plaintiff took it up. It was proved by said Allison, that plaintiff had taken up the note by substituting his own; and that afterwards plaintiff paid him, Allison, one hundred dollars on the note, saying he had got that sum out of defend-

Black testified, that after plaintiff had got out the money on the account growing out of the payment of the note, he procured a garnishment, intending to serve it on defendant; plaintiff stated to witness that on seeing defendant she preferred to give up the money she held, for defendant, and accordingly paid it over to plaintiff (to the best of witness' recollection) to be paid to defendant five hundred dollars. He further testified, that the garnishment was founded on the payment made by defendant on the Fillyaw note; plaintiff did not speak of the garnishment against defendant, but said he had the money in paying claims against defendant, against Annan & Bond, and had let defendant's son have

Black testified, that plaintiff, in January or February 1859, threatened to garnishee him and Mrs. Black

Johnson vs. Johnson.

on the claim he held against defendant as security on the Fillyaw note. Witness and his wife paid over to plaintiff \$358 50. Plaintiff, at that time, had in his hands, as agent, claims in favor of one Bond, against defendant, to the amount of \$51 00, and claims in favor of one Kennan to the amount of \$28 00. Plaintiff held claims against defendant to the amount of \$208 50. The \$358.50 was applied to the payment of these several claims. The Sheriff, H. G. Ray, was with plaintiff at the time referred to, and the object of their visit was to levy an attachment in favor of plaintiff against defendant.

It further appeared in evidence, that plaintiff had received \$19, due defendant for negro hire. The said Fillyaw note had on it the following credits: "Received on the within, \$19 38." "Received on the within note, \$88 50. Feb. 7th, 1856."

Plaintiff offered in evidence, the record of an attachment issued by the Clerk of the Circuit Court of Gadsden county, Florida, for the sum of \$438.12, besides interests and costs, in favor of plaintiff against defendant, with a receipt thereon of H. J. Ray, deputy Sheriff, of \$208.50, stated to have been paid by Mrs. Black, dated February 6, 1856; and a receipt of plaintiff stating that said deputy Sheriff had paid said amount over to him, which evidence was rejected by the Court.

There having been a verdict for defendant, counsel for plaintiff moved for a new trial on two grounds:

1st. Because the verdict was against evidence.

2d. Because the Court erred in rejecting the exemplification from Gadsden Circuit Court.

The Court overruled the motion, and counsel for plaintiff excepted.

WHITTLE and HINES representing LOVE, CAMPBELL and CRAWFORD, for plaintiff in error.

LAW and SIMS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This is an attachment sued out by Timothy M. Johnson

Johnson vs. Johnson.

against Thomas E. Johnson, to recover three hundred dollars which the plaintiff, in attachment, alleges he has paid out for defendant as his security. Evidence was submitted on both sides, and the Jury on the appeal found for the defendant. A new trial is asked for on two grounds: 1st. Because the verdict is contrary to the evidence, and secondly, because the Court erred in rejecting certain exemplifications of record from Gadsden county, State of Florida.

As to the latter ground, we will consider the case as though that evidence was before the Jury. We are satisfied, from a careful examination of the testimony, that the Jury was right in finding that the plaintiff had received more than enough money, belonging to the defendant, to re-imburse him in the amount paid to Cullen Fillyaw as security for Thomas E. Johnson. The testimony of Archibald Black and the other witnesses, abundantly establish, that he received from Mrs. Black, for the avowed purpose of paying the Fillyaw debt, greatly more than was needed for that purpose.

Indeed, an accurate account of the whole range of dealings between these parties, will show that instead of Thomas E. Johnson's being indebted to Timothy, the balance is on the other side.

And what do the Florida records show? That two attachments were sued out in that State by Timothy Johnson, one against Thomas Johnson, the other against Abel Johnson; and that to these two attachments was applied the \$358 50 received from Mrs. Black and the money of Thomas E. Johnson, \$208 50 on the attachment against Timothy Johnson, and \$150 on the attachment against Abel Johnson.—We ask—for the proof does not disclose—what right had Timothy Johnson to appropriate \$150 of Thomas Johnson's money to the debt of Abel Johnson? And money, too, which he received from Mrs. Black, with the avowed object of re-imbursing himself for the security debt paid for Timothy Johnson to Fillyaw.

And as to Thomas Johnson, there are two attachments pending against him at the instance of Timothy Johnson, one in this State, the other in Florida. He applies \$208.50 of the Black money to the attachment in Florida, and claims three hundred dollars on the attachment here, whether the debts are the same, does not distinctly appear. But this much does appear from the proof, namely, that the Fillyaw

Stone vs. Bancroft & Chamberlain.

claim, which is the foundation of this attachment, must be satisfied, because more money than enough to pay it in the hands of Mrs. Black, belonging to Thomas E. Johnson, was specifically demanded of her for that purpose, and was paid over by her accordingly, which cannot be diverted to any other demand, if indeed there be any other.

STONE vs. BANCROFT & CHAMBERLAIN.

1. No grounds taken in a motion for a new trial will be considered by the Supreme Court, unless it appears from the bill of exceptions that they truly recite what they state as having occurred on the trial.
2. The verdict in this case held to be supported by the evidence.

Assumpsit, in Muscogee Superior Court. Decided by Judge WORRILL, at May Term, 1859.

Chamberlain & Bancroft sued the firm of Stone & Johnson on a note, putting in their declaration a count also for goods sold and delivered. Osborne M. Stone, one of the defendants, pleaded *non est factum*, and further, that the firm of Stone & Johnston gave their note for the bill of goods purchased of plaintiffs, and afterwards a dissolution of said firm took place, Stone leaving ample effects in Johnson's hands to pay all the firm debts, and Johnson agreeing to become individually liable for them, which agreement was known and assented to by plaintiffs; that instead of paying said note when it fell due, Johnson was allowed by plaintiffs, without Stone's knowledge, to give a new note, signing the firm name of Stone & Johnson, in place of it, and which is the note sued on.

On the trial, plaintiffs read the note sued on, dated May 1st, 1852, and also an admission that all costs which had accrued, or might accrue, in the case, had been deposited

with the Clerk before the evidence of one Miler, (afterwards introduced) was taken.

Daniel Miler's testimony was then read. He testifies as follows :

Stone & Johnson bought goods of plaintiff on the 24th of February, 1851, to the amount of \$1,423.33, and gave their note in payment ; the note sued on was written by him and signed by William Johnson, and was given in renewal of the note made by Stone & Johnson, February 24th, 1851, and was due six months after its date ; the note first given was delivered to Johnson at the time he made the second note ; the plaintiffs have never been paid for the goods sold by them to Stone & Johnson ; he had a conversation with Stone in relation to the note sued on, about the 10th of January, 1853, in which Stone promised to pay the note, and asked indulgence, which witness, as agent of plaintiffs, granted ; witness was a clerk, and not a partner of plaintiffs ; he got ten per cent. of the profits of the business, in lieu of a fixed salary, and was not to be liable for the losses or debts of the concern ; he commenced business with plaintiffs June 1st, 1849, and left them June 1st, 1852 ; signed the release appended to his answers before testifying, and has no interest in the suit ; cannot say plaintiffs knew of the dissolution of the firm of Stone & Johnson when witness took the note sued on, but thinks they did ; witness knew Johnson was in failing circumstances when he had the conversation with Stone, in January, 1853 ; Stone said he was going to Hamilton for the purpose of securing himself ; cannot say whether or not he presented the note to Stone, but their conversation related to the note sued on ; the release attached transfers all the interest of witness in the note and claim in controversy to Charles V. Chamberlain, for a valuable consideration, to-wit \$75, and is attested by two witnesses.

The answer of the same witness to another set of interrogatories was read, but no new fact appears in them, except that plaintiffs sold goods to Johnson individually, after the firm of Stone & Johnson was dissolved.

Plaintiffs then read the evidence of Alexander Isaacs, as follows : In December, 1853, or January, 1854, had a conversation with defendant, Stone, and demanded of him payment of the note sued on ; he refused, and said he would

Stone vs. Bancroft & Chamberlain.

not pay the note, unless compelled by Law; witness reminded him of his promise to Miler, which promise he admitted, but said some one had informed him since that time that he was not bound to pay the note, Johnson having given it after Stone & Johnson dissolved; Stone admitted the justice of the debt, and said Stone & Johnson had received the value for which the note was given, and that he knew the note sued on was made in renewal of the original note; he stated that he had left assets in Johnson's hands to pay all the debts of Stone & Johnson, but that Johnson had misapplied them; plaintiffs knew of the dissolution of the firm of Stone & Johnson at the time the note sued on was made.

The evidence closed, and the Jury returned a verdict for the plaintiffs.

Counsel for Stone moved for a new trial on the following grounds:

1st. Because the Court erred in overruling the motion of defendant's counsel to suppress the interrogatories of Daniel Miler, on the ground stated in the brief of evidence, (which ground is stated therein as follows: Defendant's counsel objected that said Miler was not a competent witness, being interested in the result of the suit, and that the deed of assignment signed by him and attached to the interrogatories, did not make him competent, and if it did, the execution and delivery of such assignment was not properly proven.)

2d. Because the Court erred in refusing to charge the Jury, as requested by defendant's counsel, that the promise of Stone was not binding on him, unless he knew the facts, and that he was further apprised of the fact, that by Law, he was discharged from liability from the debts when he made the promise.

3d. Because the verdict was without evidence, and against the weight of evidence, and contrary to the charge of the Court.

4th. Because Richard P. Spencer, who was one of the panel of Jurors from which a Jury was stricken, had sat on a former trial of this case, which fact was known to the parties, and the Juror, being questioned by the Court as to the fact, answered that he did not recollect sitting on it, but thought he had not, and that defendant's counsel struck said Juror, thereby losing one strike. (In support of this ground,

essrs. Dougherty and Ingram, attorneys for defendant, made affidavits, stating that they did not know Mr. Spencer and sat on the case on a former trial, until after the verdict was sought to be set aside, and that they did not understand plaintiffs' counsel to propose to set the Juror aside for cause, as stated by Mr. Sloan, one of the plaintiffs counsel.

The record contains no certificate of the Judge before whom the case was tried, that the allegations in the foregoing motion are true.

The Court below refused to grant a new trial, and defendant's counsel excepted.

INGRAM & RUSSELL, W. DOUGHERTY, for the plaintiffs in error.

JOHNSON & SLOAN, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. This bill of exceptions informs us that this plaintiff in error moved for a new trial on the grounds which are stated in the motion as appears in the record which accompanies the bill of exceptions; but it does not inform us that these grounds recited truly what had occurred on the trial. We cannot, therefore, consider any of them except that which complains that the verdict is against the evidence. This ground is an exception, because its validity depends solely upon a comparison of the verdict with the evidence which is duly certified to us, and to entertain it, we have only to know that it was *taken*; while the other grounds depend upon the truth of their recitals of facts which occurred on the trial.

2. When this same case was before this Court on a former occasion, the Law of it was held to be, that while Stone was not bound by a note given by his former partner after the dissolution of the partnership, yet his promise to pay it after it had been given, was a ratification of it, and bound him. The evidence in this case comes up to that principle. The witness, Isaacs, states explicitly that Stone promised to pay the note, knowing that it was a note made after the dis-

Gilliam and Berry vs. Love.

solution of the partnership. We cannot say, therefore, that this verdict is unsupported by the evidence.

Judgment affirmed.

GILLIAM AND BERRY vs. LOVE.

In an action for trespass, in beating the plaintiff and tearing down his house. Evidence that the defendant declared, while committing the trespass, that he was doing it because the plaintiff traded with his negroes, is proper evidence to go in mitigation of damages.

Trespass, from Dougherty Superior Court. Tried before Judge ALLEN, at June Term, 1860.

This was an action brought by John Love against Joseph Gilliam and Thomas Berry, for trespass upon the person and property of plaintiff.

On the trial, the answers of several witnesses, taken by commission, were read in evidence by plaintiff, going to prove the trespass, both upon the person of plaintiff, by beating him, and upon his property, by entering upon his premises, tearing down his houses, causing his crop to be injured, the extent of the injury, &c.

In answer to a cross interrogatory propounded by defendants' counsel, one of the witnesses answered, "that defendants said that they were doing so (referring to the trespass because plaintiff had been trading with negroes."

Counsel for plaintiff moved to reject this part of the evidence, consisting of the sayings of the defendant. The Court sustained the motion, and counsel for defendant accepted.

The Jury found a verdict of fifty dollars for plaintiff, and counsel for defendant moved for a new trial mainly on the

Gilliam and Berry vs. Love.

of the above stated evidence—which motion was by the Court, and counsel for the defendant ex-

R, for plaintiff in error.

I, *contra*.

Court.—STEPHENS, J., delivering the opinion.

no objection made to this evidence for want of action of its verity. It is not hearsay evidence, and was uttered by the defendants while in the act of the trespass for which they were sued. The objection against it is, that it is irrelevant, since the fact that the plaintiff had traded with negroes could be no justification for committing a trespass on him. We do not think the fact amounts to a justification of the trespass—nor does it: but the fact was a proper one to be taken into account in fixing the amount of damages. To hold otherwise is to ignore any distinction between the fiend who commits a crime for the love of it, and the frail mortal who commits a crime in a moment of indignation, on account of a real injury, to hurry to an illegal mode of redress. We think the evidence is competent and should be admitted.

The judgment is reversed.

Dempsey vs. Hertzfield.

DEMPSEY vs. HERTZFELD.

1. An action for breach of contract survives against the executor of the defendant.
2. In an action by a tenant against a landlord for breach of a written contract to stop a leak, it is admissible for the tenant to prove by *parol* the purpose for which the landlord knew that the house was rented.
3. Where the landlord makes successive attempts to stop the leak, but fails through defective workmanship, he must pay the tenant, under such a contract, full compensation for the injury done to goods in the house during the period of those attempts and failures.

Case, in Bibb Superior Court. Tried before Judge LAMAR, at May Term, 1860.

This was an action brought by Joseph Hertzfield against the Executor of Dermad Dempsey, deceased, to recover damages for failure to repair a certain store house, rented by plaintiff from said Dempsey, as had been agreed on, whereby loss accrued to the plaintiff by injury to his stock of goods from rains, &c. It was alleged that the store was rented for a dry-goods store.

On the trial, the plaintiff proved the renting and terms of it as alleged, and a promise by Dempsey to repair the roof of the store, so that it would not leak—all of which was in writing. There was nothing in the writing as to what the store was to be used for.

It was further proved, that the store was rented for a dry-goods store; that Dempsey was called on several times after the renting, to make the roof tight to keep out the rain, but that the roof leaked badly, and damaged plaintiff's goods. Proof was made as to character and extent of the leakage, and the damage caused thereby. An inventory of the goods had been made before they were damaged.

Defendants proved that several attempts were made to repair the roof and stop the leakage; the covering was of slate; some of the slates had broken off and others put in place of them; after making the repairs the leaks were supposed to have been stopped.

The Jury found for the plaintiff \$1,958.

Counsel for defendant moved for a new trial on the following grounds:

Dempsey vs. Hertzfield.

cause the Court refused the motion of counsel, for
to strike out so much of his writ as sought to charge
with the damage to plaintiff's stock of goods, and
the whole writ.

cause the Court ruled and held that, under the
prement, the defendant was liable for damage done
to his goods by leakage of the house or roof.

cause the Court allowed the witness Hartz, when
called by defendant, to prove that the store was rented
as a goods and clothing store.

cause the Court erred in allowing plaintiff to prove
the value of his stock of goods and the damage thereto by

cause the Court refused to charge the Jury as re-
specting defendant's counsel, that if plaintiff knew the
facts and Dempsey, after being notified to repair, did
not repair, plaintiff, by having the repairs made, could have
avoided leaks and saved the damage, it was his duty to

cause the Court charged the Jury that it was
the duty to repair the roof, and that plaintiff was not
excused so under the proof.

cause the suit abated by the death of Dempsey,
and survive as against his executor, and on which
the defendant will move the Court in arrest of Judg-
ment case

cause the Court erred in allowing Hartz to prove
the stock of goods without producing the inven-
tory of the witness when objected to by defendant.

cause the Jury found against and without evidence.
The Court refused the motion for a new trial, and defend-
er excepted.

for plaintiff in error.

AB, *contra*.

It.—STEPHENS, J., delivering the opinion.

tion is founded on a breach of contract
in any possible legal sense of that term
(5)

Dempsey vs. Hartzfield.

we cannot see, therefore, any reason to doubt that it survives against the executor.

2. Proof of the purpose for which the house was rented, was properly admitted. That proof did not, as was contended in the argument, add anything to the written contract; it only went to show the amount of damage properly chargeable against the defendant on account of the breach of the contract as it stands in the writing. His contract was to stop the leak, and the plaintiff, in order to recover damages for the breach of it, had to show, not only that he had sustained injury, but that the injury was such an one that the parties must be presumed, in reasonable contemplation, to have foreseen that it would be a probable consequence of a breach of the contract. The purpose for which the house was to be used, showed what sort of things the parties must have foreseen would be injured by a failure to stop the leak.

3. The main controversy in this case, was as to the measure of damages. It was contended by Mr. Dempsey's counsel that although he may have failed to stop the leak, yet Hartzfield, the plaintiff below, could recover for only such injury as he could not have prevented by prudence on his own part; and that as he might easily have prevented all the injury by having the leak stopped himself, he ought to recover only the reasonable cost of stopping the leak. Such a rule is not applicable to this case, for there was not disclosed any failure of prudence on the part of Hartzfield. By the contract, the burthen of stopping the leak was on Dempsey, and not on Hartzfield. Mr. Dempsey made an effort to stop it, and pronounced it stopped. Mr. Hartzfield relied on that announcement and had a *right* to rely on it till he found the rain pouring on his goods. He then gave Mr. Dempsey notice that the attempt to stop the leak had proved a failure. Mr. Dempsey made another attempt, and left the roof as a sound and safe. Mr. Hartzfield relied again on the fact that Mr. Dempsey had done his duty, and he had a *right* to rely on it, till he again found it otherwise. Thus the process went on, till from many successive failures of Mr. Dempsey's defective work, the goods in the store were greatly injured, Mr. Hartzfield suffering and having a right to sue all the while that Mr. Dempsey had done his duty, until it was demonstrated the contrary. Surely there was no ~~sub-~~

McElven vs. The State of Georgia.

Hartzfield to take upon himself the performance of his duty, when Mr. Dempsey was all the while engaged to perform it for himself, and professing at each step to have succeeded. There was but one fault in the air, and that was a constant resort to patch-work, for a thorough renovation of the roof. That fault was Dempsey's, and he ought to bear the consequences. At the other points were abandoned.

He affirmed

MC ELVEN vs. THE STATE OF GEORGIA.

He was not heard in impeachment of his own verdict. In giving the law of reasonable doubts, for the Judge to tell the reasonable doubts usually arise from either want of evidence or evidence, in a case where the doubt did not arise from either of these, but turned solely upon the internal credibility of an explanation given by the defendant had given of the circumstances against him, when it was brought to his notice.

He was tried for Larceny, in Mitchell county. Tried before the Court at Macon, May Term, 1860.

The indictment in error was indicted for larceny. On the trial, the defendant in the Court below, moved to quash the indictment on the ground that there was but one offence, and that it alleged three distinct offences. The Court overruled the motion, and counsel for defendant

permitted the Solicitor General to select as to which of the three charges he would try the prisoner on. The Court then moved to strike out the other two grounds,

McElven vs. The State of Georgia.

which motion the Court overruled, and the Solicitor elected to try said defendant on the charge of larceny in taking the sheep of David W. Culpepper, to which defendant excepted.

Counsel for the State then introduced James B. Culpepper, who testified that he, one Curls and David Culpepper, were at defendant's house in said county. Witness and his brother had gone to defendant's farm after some sheep. One of them asked defendant if there were any stray sheep in his pen. Defendant said he thought not, but witness and brother could go and examine. They went to the sheep pen under defendant's gin-house and there found two weathers and one ram, the property of said Culpepper; the sheep were white colored, marked with a cross in the left ear, and a swallow fork in the right; this was the mark of David Culpepper, and was the old mark. There was also a fresh mark in the swallow fork ear, consisting of an underbit and overbit. Witness knew the sheep well—the ram especially, because his tail was slick like that of an opossum. Witness had marked and tended the sheep, and knew them. David Culpepper's sheep herded and ranged in the neighborhood of defendant. David Culpepper jumped into the pen and caught one of the sheep, and catching the sheep's head placed it very near the face of defendant, and asked him if he claimed that sheep. Defendant said he did, and then David Culpepper said that he claimed it also, and asked him what this meant, at the same time placing his hands on the fresh marks of the sheep. Defendant looked at the fresh marks and took hold of the ears, which bled freely. Defendant said he must have made a mistake in marking the sheep, as he thought they were sheep belonging to the Parmer stock. Defendant exhibited a bill of sale for the Parmer sheep, from which witness learned what the mark of the Parmer stock was, and that it was a cross and split in one ear, and a swallow fork in the other. Defendant also said this was the Parmer mark; he also said he had bought the Parmer sheep, and had been changing their marks. Witness says that the mark of David Culpepper was a cross in the left ear, and a swallow fork in the right. Defendant knew the mark of David Culpepper well, and had assisted several times in driving his sheep, in this mark, for shearing. Defendant lives in Mitchell county, and the sheep were at his farm and placed in a pen. The range of said sheep was in

McElven vs. The State of Georgia.

county. This was in sheep-shearing time, in April, and the sheep were worth two dollars per head.

State here closed. Defendant introduced no evidence.

Having been a verdict against the defendant, his motion for a new trial upon the following grounds:

1 2d. Because the Jury found contrary to evidence weight of evidence.

Cause, after the Jury had been charged with the whilst deliberating in their room upon it, Reddish one of the Jury, stated to the Jury that he had sold the Parmer stock of sheep, and had sold them; he knew the sheep were not in the mark of the cribed in the bill of sale, and that defendant was such statement was not given in evidence, and which fact to influence the Jury, and caused a portion of and a verdict of guilty. (The affidavit of two of showed that Godwin did make the statement as tioned.)

Cause the Jury found contrary to the charge of —the Court charging that the intent to steal was a ingredient in larceny, and that if they believed, evidence, defendant intended to steal the sheep, find him guilty, but if they should believe that taken, and took the sheep under a mistake, been to be his, then he was not guilty, and that they ge of this from the evidence.

Cause the Court erred in charging the Jury, that reasonable doubt, the prisoner was entitled to of that doubt; and that a reasonable doubt usur from a want of evidence, or where there was a vidence.

It overruled the motion for a new trial on all the defendant excepted.

for plaintiff in error.

General SMITH, *contra*.

urt.—STEPHENS, J., delivering the opinion.

signments of error in this case are overruled,

McElven vs. The State of Georgia.

except the 5th in relation to the charge as to reasonable doubts. The Court charged that the prisoner was entitled to the benefit of reasonable doubts, but added that reasonable doubts usually arose from either a want of evidence or a conflict of evidence. This addendum had a tendency to unduly depreciate the doubt urged in this case, by an intimation that it rested on an *unusual* ground, for whatever doubt there was, did not arise from want of evidence nor from conflict of evidence, but turned solely upon the *credibility* of a part of the evidence, its credibility being attacked on the ground, not of conflicting evidence, but of its *own unreasonableness*. A part of the evidence was an explanation which the defendant gave when the sheep were found in his pen, to the effect that he had mistaken these sheep for some of his own. The reply to this was, that it was a mere fabrication entitled to no credit. Now there are two circumstances which, in my judgment, tend strongly to sustain it. One is, that while it had been given long before the trial, and was of a character to be easily exposed, if false, it was *not* exposed. The other is, that while there is a very close resemblance between the mark of these sheep and the mark of his own as described in his bill of sale, the only difference is one *additional* mark in *his own*. In fabricating a mark with a view to protecting himself in stealing Culpepper's sheep, as it was alleged he did, he might have *omitted* a mark which Culpepper's sheep had, from overlooking it, but he would hardly have *added* one which they did not have. To suppose, therefore, that the mark in that bill of sale was a fabricated one, is supposing that he fabricated it for his own *detection* and not for his protection. These circumstances *commenced* his story, to my mind, as a reasonable one. All the *doubts* in the case turned upon its reasonableness. The question was, not whether the cause of the doubts was an *unusual* one, but whether it was a reasonable one. If the doubts were reasonable, it was immaterial whether they arose from a usual or an unusual cause, and the attention of the *Jury* ought not to have been directed to such an issue, by *even the slightest* intimation.

Judgment reversed.

ROE, Casual Ejector, et al. vs. DOE, ex dem. et al.

The titles of the different lessors of the plaintiff in ejectment, are different causes of action, and for purposes of defense, the action, as to each one of them, is to be considered as commenced when that one is introduced into the declaration, whether it be introduced at the beginning or as an amendment afterwards.

Ejectment, in Marion Superior Court. Tried before Judge WORRILL, at March Term, 1860.

This was an Action of Ejectment brought by Doe, *ex dem.* William A. Pierce, against Roe, casual ejector, and Catherine Tidd, tenant in possession, for the recovery of lot of land number 259, situated in the fourth district of Marion county.

Upon the trial, plaintiff offered and read in evidence, a grant from the State of Georgia to William A. Pierce, his lessor, for the premises in controversy, proved defendant's possession and the *locus*, and closed.

Defendant then proved that Pierce, the plaintiffs' lessor, died about twenty years before the commencement of this suit, and that she, Catharine Tidd, had been in the peaceable, continued, and adverse possession of the premises in dispute, under color of title and claim of right for more than seven years prior to the bringing of suit.

Plaintiff then amended his declaration by striking out the demise from Pierce, and inserting a demise from Mahala Jane Garriss, and proved that she was the heir at Law of said Pierce.

The demise from Pierce was alleged in the declaration to have been made the first of January, 1854. The action was commenced the 7th of August, 1855.

Upon this state of the facts and pleadings, and after argument, the presiding Judge charged the Jury, that if Pierce, the plaintiff's lessor, were the drawer of the land, and Mahala Jane Garriss was his heir at Law, then plaintiff was entitled to recover on her demise, notwithstanding Pierce may have been dead more than twenty years before suit was commenced in his name. That, although Mahala Jane Garriss had not asserted her right as brought her suit within seven years after the accrual of her right, yet if the action had

Bee et al. vs. Doe et al.

been commenced in the name of another, before her right as cause of action was bound by the Statute of Limitations, she had the right to come in and be made a party to the suit at any time, and could recover, notwithstanding the statutory period had elapsed before she was made a party. To which charge counsel for defendant excepted.

The Jury, under the charge, found for the plaintiff upon the demise of Mahala Jane Garris, and counsel for defendant tended their bill of exceptions, assigning said charge as error.

HINTON & BUTT, and LEVI B. SMITH, for plaintiff in error.

BLANDFORD & CRAWFORD, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

Mr. Justice Blackstone, in 3 *Book Com. side page* 205, says it was resolved by all the Judges in 32 *Geo.*, 2, that the writ of ejectment and its nominal parties are "judicially to be considered as the fictitious form of an action, really brought by the lessor of the plaintiff against the tenant in possession; invented, under the control and power of the Court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side." The peculiar advantage which this form of action confers upon the lessor of the plaintiff is, that, in addition to his own title, he may avail himself of the titles of other persons whom, under equitable restrictions, he may introduce as other lessors of the plaintiff. These different titles are different causes of action which are allowed to be joined in the same action. In their nature, they are not amendments, one to the other, but separate causes of action, each one in conflict with all the rest; and though new ones may be introduced in the progress of the case by way of amendment, yet they are introduced upon *terms*, and the defendant may plead *de novo*. See note, *Adams on Eject.*, 201. The amendments, should never be allowed to defeat the just consequences of their true nature as new causes of action.—

Cherry & Walker vs. Sutton.

these titles, whether introduced at the beginning or endment afterwards, should be tried upon its *own* it may stand when introduced to the Court. For of defense, justice requires that, as to each one of action should be considered as *commenced* when of action is introduced into the declaration. To he action has been commenced as to any cause of ore that cause of action has been brought to the he Court, is to invent a new fiction for the defeat nstead of its advancement.

it reversed.

CHERRY & WALKER vs. SUTTON.

Florida, contracts to sell and deliver to C. & W., butchers in Macon, Georgia, 600 head of beef cattle, at a stipulated price— 200 the first of June, 200 the first of August, and 200 the 1st

The first two instalments are delivered and a note given in ; the plaintiff fails or refuses to deliver the remaining 200. a suit by S. upon the note given for the cattle, C. & W may ovey by the amount of damage they sustained on account of ilure to consummate the contract.

in Bibb Superior Court. Tried before Judge November Term, 1859.

an action brought by John A. Sutton, against rror, to recover the amount claimed to be due ry note for the principal sum of \$1,000. ion the defendants pleaded a failure of consid- ing out of an alleged breach of a contract be- ties. (The terms of which will appear in the

Cherry & Walker vs. Sutton

On the trial, after plaintiff had put said note in evidence and rested his case, defendant made the following proof:

JAMES S. DUKES testified: That in the Spring of 1857, there was a contract made between plaintiff and defendants, by which plaintiff was to deliver to them, in Macon, Georgia, six hundred head of good merchantable beef cattle at four cents per pound—200 head to be delivered the first of June, 200 on the first of August, and 200 on the first of November of that year; that on the first of June, 200 head were delivered and paid for; and sometime in August or September, plaintiff brought 200 more, but defendants refused to receive them, on the ground that they were too poor for beef, and were not merchantable beef cattle. Defendants finally took the cattle and paid plaintiff some \$1,500 in cash, and gave him the note in controversy upon the promise and agreement of plaintiff, that the deficiency in this lot, as to value, was to be made up in the next lot to be delivered in November, but plaintiff did not deliver any cattle in November or afterwards; that in August, beef was worth from $3\frac{1}{2}$ to 4 cents per pound, and in November from 5 to 6 cents; that defendants were injured by such failure to deliver said cattle in November, to an amount fully equal to the note; that many of the cattle delivered in August were so poor that nothing could be done with them, and were an entire loss; that about the 1st of November of that year, the plaintiff came to defendants and said the balance of the cattle were on the way from Florida, where plaintiff resided, and would be there in a few days, and asked defendants to pay the note, which was not done, nor did the cattle ever come.

William Holmes testified in substance the same as above.

STEPHEN COLLINS testified: That in September, 1857, he looked at about 100 head of cattle in defendants' field, who offered to sell them to witness, who was then purchasing cattle to fatten for beef. Witness declined to make the purchase, as they were too poor for that purpose; did not consider them worth anything; that good cattle in August would bring 12 cents, in November would bring 18 cents.

The defendants having closed, asked the Court to charge the Jury, that if they believed the contract, as testified by Dukes and Holmes, had been sufficiently proved, that

Cherry & Walker vs. Sutton.

failed to deliver cattle in November as stipulated contract, and defendants had been damaged reason of cattle being at that time worth more than stipulated, then to the extent of the damage deduction should be made by the Jury from the plaintiff's claim; which charge the Court refused to charge that said facts, if proved, was no defense to the plaintiff's claim in whole or in part, but defendant's case, would be an action against plaintiff for breach of contract.

The Court further asked the Court to charge, that if it was proved that the delivery of 600 head of beef cattle was made in part performance of the contract, and the note given in part performance of the contract, and plaintiff afterwards failed to deliver the cattle, the plaintiff could not recover.—The Court also refused to give. To which refusal to charge, counsel for defendants excepted.

Plaintiff in error.

ANDERSON, *contra*.

2.—LUMPKIN, J., delivering the opinion.

Defendants entitled to the first charge requested?

In this case, was an entirety; and if the defendant failed to deliver the third lot of cattle as he agreed, the defendants were damaged thereby, they are entitled to the amount due the plaintiff, to be reduced by the injury they received; and they will not maintain a cross action—especially against a non-resident.

This has been several times decided by this Court, and is fully covered by *Mell vs. Mooney*, recently decided in Savannah.

Brown vs. McCrary.

BROWN vs. McCRARY.

A Sheriff holding several *fi. fas.* against the same defendant, is not excused by a claim interposed against one of them, from proceeding with the rest.

Rule, against Sheriff from Taylor county. Decided by Judge WORRILL, October Term, 1859.

This was a Rule against the Sheriff on a *fi. fa.* for principal sum of \$162.38, besides interest and costs, in favor of William M. Brown, plaintiff, vs. John A. Moss, defendant.

In answer to the Rule, the Sheriff showed for cause that he had had in custody a negro woman named Amanda, the property of defendant in *fi. fa.*; that there had been several other executions in his hands, besides the one above mentioned, and among them, one in favor of J. P. Griffin for the use of William J. Kendrick, against the defendant Moss, for the sum of \$125.35 principal, besides interest and cost; that one Sampson Bell had proposed to interpose a claim to said slave in all said cases; and that he, the Sheriff, being advised that it was not necessary to enter a levy on more than one *fi. fa.* so as to try the right of property, entered a levy on the *fi. fa.* in favor of Griffin only, when a claim was interposed by Bell, as above proposed, and which claim is still pending and undetermined.

It was admitted further by the Sheriff, that since the *fi. fa.* in favor of plaintiff, Brown, had been in his hands, the lot of land number 162, in the 12th district of Taylor county, had been levied on by virtue thereof, and of other *fi. fas.* and sold for \$2,500; and that he had been prevented from selling the other lot levied on by a claim which had been interposed to it, and which had been pending up to that term of the Court. He further answered that he had in hand \$195, raised by the sale of defendants personal property, levied on by various executions against him—less \$26.34 he paid on a tax execution; the balance of which fund was subject to distribution under the order of the Court.

On hearing the answer, the Court refused to make them absolute, and plaintiff's counsel excepted.

BLANDFORD & CRAWFORD, for plaintiff in error.

SMITH & POPE, for defendant.

Scott *et al.* vs. Winship *et al.*

By the Court—STEPHENS, J., delivering the opinion.

The Sheriff ought to have levied on the property and sold it, unless a claim had been interposed in *this case*. The adjudication of the claim which was interposed in another case, cannot settle the right of this plaintiff in execution, for two reasons: In the first place, he is not a *party* to that litigation, and, therefore, can not be bound by the result of it. In the second place, the *merits* of that case may be very different from the merits of a claim in his case. The true issue in a claim case is, whether or not the claimant has such an interest in the property as ought to prevent the plaintiff from selling it. Now the claimant may have an interest which is perfectly adequate to stop one plaintiff, but powerless to stop another. The Statute makes the Sheriff liable whenever he neglects his duty to the injury of a party.—Here are both the neglect of duty and the resulting injury to the plaintiff. Whether he is to be met with a claim in his case or not, he has been delayed in the enforcement of his remedy, and delay is injury.

Judgment reversed.

SCOTT *et al.* vs. WINSHIP *et al.*

When this Court is satisfied with the general result in an Equity cause, but considers that the decree might be modified in a manner beneficial to all parties concerned, it will send the case for this special purpose, without reopening the whole merits of the litigation.

In Equity, in Bibb Superior Court. Decided by Judge Lamar, at May Term, 1859.

Isaac Winship individually, and the firm of Isaac Win-

Scott et al. vs. Winship et al.

ship & Son, filed their Bill against Eliza J. Scott and William B. Scott in Bibb Superior Court. The Bill alleges, that at the November Term of Bibb Superior Court, Isaac Winship obtained a judgment against William B. Scott, then a resident of said county, for \$661.87, besides interest and costs; that previous to that time, Scott had owned some \$10,000 worth of property, but had sold most of it to his brother-in-law, and when said judgment was rendered, had in his possession a few negroes only, having by improvidence and dissipation squandered a good deal of his estate; that Isaac Winship & Son also held a note on him for \$219.22, besides interest for goods furnished, and were creditors of Scott to that extent at that time; that about the time said judgment was rendered, Scott removed from Bibb to Cass County, and took with him said negroes received by him from his father's estate, taking them with the consent of his mother, Eliza J. Scott; that owing to the conduct of said William B. Scott, they became apprehensive of the loss of their debts—having learned, in the early part of 1855, that he had taken steps secretly and fraudulently to carry said negroes from Cass County into the State of Alabama for the purpose of defrauding his creditors; that whilst they were on the cars going to Alabama, two were levied on by virtue of the fi. fa. issued on said judgment, and the remaining seven were carried out of the limits of the State; that Eliza J. Scott interposed a claim to the two levied on, under an alleged Bill of Sale from said William B.; that in support of her claim she proved that she had conveyed her interest in her husband's estate to her four children—William B. being one—on condition that they would each secure her by mortgage on unencumbered property, an annuity during life of \$287.50—the conveyance to be void if the annuity was not paid; the Bill alleges that all the children except William B. had executed mortgages according to agreement, but for some unknown cause, unless it was to aid him and preserve his credit, she took no mortgage from him, but in June, 1853, professed to buy said negroes from him for the alleged consideration of \$3,000, when they were worth \$2,000 or \$7,000—said slaves then constituting his whole estate: that no one was present when said sale or contract was made except relatives of the parties, and the property was suffered to remain in possession of said William B., to use and

same so long as he paid said annuity, and after his death, it was to be his property; that the only one of said sale or contract was the annuity aforementioned on the trial of said claim case, the Jury found in favor of the subject, and Mrs. Scott appealed to the Supreme Court, which granted her a new trial on such grounds as were necessary for complainants to file a Bill; that Mrs. Scott has a reversionary interest in said negroes of her mother, which in Equity should be subject to the payment of his debts—the hire being sufficient to pay said annuity; that said Scott was fast approaching in the time of said sale, and is now hopelessly so; said negroes are now under Mrs. Scott's control, and she pays them \$500 a year for hire and that most of them have been carried out of the jurisdiction of the Court. The plaintiff prays the re-sale of said negroes, and that after the payment of Mrs. Scott's annuity, a sufficient amount of the surplus to be paid to complainants to satisfy their claims. The defendants admit that Wm. B. Scott was negligent, and wasted a large part of his estate, and that the time exceeded largely the amount stated by the plaintiff; that there was no property in his possession at the time of 1854, except said negroes, which did not belong to him; that Scott sold his plantation, stock, &c., to the plaintiff at law, but not his entire estate—excepting said negroes; that said Scott made a Bill of Sale of the same to Mrs. Scott, but the answers deny that there was any understanding that it was to be mere security, or that the property was to revert on Mrs. Scott's death—on the contrary they say it was a fair and *bona fide* sale in satisfaction of just debt, and for a full consideration, the negroes were then worth about \$3,000; they deny that Scott intended when the Bill of Sale was made, and state that the negroes, other than said negroes, amply sufficient to pay his debts and leave several thousand dollars bequeathed to her; that she did permit her son to take said negroes to Cass County—he having removed to that County in June, 1853—being assured that her title was good, and being willing to aid her son, though she ran the risk; she says she did not take a mortgage from her son, as she did from the other children, because she had no real estate and had nothing but personalty,

Scott et al. vs. Winship et al.

and he being improvident, she preferred to get the title to the negroes; she says if her son ever designed to run off the negroes, it was not with her knowledge or consent; that she did so far yield to the persuasions of a friend as to start to remove said negroes to Texas, and had them brought to her at Montgomery for that purpose, but there changed her mind, and brought them back to Macon; her object in starting them to Texas was not to defraud any one but to carry them where they would be most profitable; she denies all fraud and combination.

William B. Scott states, in addition, that he removed to Cass County in June, 1853, and continued to reside there until after said judgment for \$661.87 was obtained; he states that the judgment was obtained on a garnishment and for a debt which he was sued for in Cass County and had to pay; that he supposed when he answered said garnishment he was fully protected in the matter, and was unapprised that a judgment had been entered against him until after he had paid the debt (which was a note) in the hands of a transferee; he denies having anything to do with the removal of the negroes from Cass County, and denies all desire or design to defraud complainants or any one else; he says his mother permitted him to retain possession of said negroes, he agreeing to pay her hire at the rate of \$287.50 per annum, but that he never paid her more than one year's hire.

On the trial of the case, complainants introduced the following proof:

They offered a *rule nisi* obtained at November Term, 1853, of Bibb Superior Court, reciting that William B. Scott had been served with garnishment returnable to that Term, and had failed to answer, and calling on him to show cause, by the next Term, why judgment should not go against him. Scott's answer, filed at May Term, 1854, was then read, which begins by stating the case as a garnishment returnable to the November Term, 1853, and ~~rule nisi~~ to May Term, 1854. The answer states, that at the time garnishment was served, he was, and "still is," indebted to William C. Jones \$661.87 on a note dated February 2d, 1853, and due sixty days thereafter. Then follows ~~an~~ *absolute*, which was read in evidence, entering judgment in favor of Isaac Winship against said Scott as garnishee for the amount of said note, the judgment bearing date ~~November~~

1854, but entered *nunc pro tunc* as of May Term,

nants sustained by proof their allegations relative to her children, on condition that they would by mortgage, an annuity during life of \$287.50 showed that all the children except William B. executed mortgages to her.

Barfield was then sworn and stated: That he knew the negroes in 1849, except Zach and Effy. He gave what he supposes they were worth in 1858, in their appearance in 1849. The aggregate of his estimate is, that the negroes he knew were worth from \$3,300; his estimate for hire ranges from about \$100.

Barfield testified as to the value of the negroes: says in 1852; their aggregate value then, as testified by him, was \$3,500; hire from \$325 to \$350.

He further testified, that William B. Scott gave him a plantation and some negroes in June, 1853, said Scott retained possession of the negroes in the Bill of Sale to his mother after the same was made and went to Cass County in the summer of 1853, with the mules and negroes; Mrs. Scott is about sixty years of age; witness thinks Freeman gave William B. Scott the plantation; the homestead was worth \$5,000; Mrs. Scott is a stout, good-looking old lady.

Barfield testified: That he is a son of Mrs. Scott, and knows the arrangement between Mrs. Scott and her son; he does not think he was present when the Bill of Sale was made between William B. Scott to his mother; witness said William B. was to retain possession of the plantation as long as he paid the annuity, but is not positive in his recollection on the subject. When he (Barfield) was a former trial that the negroes reverted on the death of William B. Scott, he stated merely his own inferences from the agreement to that effect; the annuity to Mrs. Scott's other children was to cease at the death of William B.'s liability for the annuity was as the liability of the others, but does not think this is derived from the parties or from infer-

Scott et al. vs. Winship et al.

Here complainants after introducing their two *fi. fa.*, rested their case.

Defendants then read to the Jury the original garnishment paper sued out by Isaac Winship in the case of William C. Jones, the garnishment affidavit bearing date April 28th, 1858, and having thereon the following entries of service:

"Executed the within by serving John J. Carey, as one of the firm of Hall & Carey, personally with a summons of garnishment, and have advertised my proceedings according to Law—29th day of April, 1853.

[Signed]

"D. I. DAVIS, Sheriff."

"Served John J. Rawls personally with a summons of garnishment—Oct. 1st, 1853.

[Signed]

"T. BAGBY, D. Sheriff."

"Served William B. Scott, as a garnishee, personally with a summons of garnishment on the within stated case—30th April, 1854.

[Signed]

"THOS. BAGBY, D. Sheriff."

Defendants also put in evidence a Bill of Sale from William B. to Eliza J. Scott, dated June 22d, 1853, conveying, in consideration of \$3,000, the negroes in dispute to the said Eliza J. with warranty of title. There was no witness to the paper.

Here defendants rested their case and complainants, in rebuttal, read the evidence of R. F. Maddox, who stated that, as Sheriff of Troup County, he levied a *fi. fa.* in favor of Winship against Wm. B. Scott, in February, 1855, on two of the negroes in dispute; found the negroes levied on with several others, on the cars of the Atlanta & La Grange Railroad, going towards Texas; the young man who had charge of the negroes, stated that William B. Scott had hired him to take the negroes to Montgomery or New Orleans; thinks he also stated that he expected to meet Mrs. Scott in New Orleans.

Complainants also read the evidence of Mrs. Eliza J. Scott, taken by commission. She testified, that, when the negroes were levied on by the Sheriff of Troup County, they were in charge of one Aycock, who had been employed

Scott et al. vs. Winship et al.

milton to bring them to her; William B. Scott carrying them to Texas; William B. Scott did not pay taxes on the negroes in Cass County; does not know whether he did before carrying them there or not; never paid taxes on them; the negroes were in Wilcott's possession and under his control all the time in Cass County, but not afterwards. Witness saw her negroes some time ago among her children, whom she was under obligations to pay her a stated amount, to wit: \$287.50; she was satisfied to let Wilcott keep the negroes by his paying that sum; the negroes which fell to said William B., on the division of the property, are the negroes in dispute.

The court then read to the Jury a certificate from the Cass County Superior Court, showing that William B. Scott was in 1854 on the following property, as his own, slaves, valued at \$4,050; money and solvent property, valued at \$1,000; other property, (plantation tools excepted,) valued at \$1,000.

The court then closed, and the Jury returned the following verdict:

The Jury find and decree in favor of complainants, Winship and Isaac Winship & Son, that their bill is valid and binding for the amount of each, principal and interest. We further find and decree, that the negro slaves in the Bill of complainants mentioning them) shall within forty days from this date be sold and turned over by said Eliza J. Scott to a person to be appointed by this honorable Court during the next term, and after the usual advertisement, said person shall sell at public outcry, and a sufficient amount of money shall be raised and invested securely, to pay said Eliza J. Scott an annuity of \$287.50 annually during her natural life, and the sum is thus set apart, the balance of proceeds of the sale shall be applied to the payment of the judgments of the Court.

We further find and decree, that upon the death of the life of said Eliza J. Scott, the said sum shall be paid and funded to pay said annuity, shall be paid over into the hands of the Clerk of this honorable Court to be applied to judgments against said Eliza J. Scott, if any there be, or to his order, if there be no said fund. We further find and decree the

Scott et al. vs. Winship et al.

costs of this proceeding against the defendants. May 17th, 1859."

Defendants moved for a new trial on the following grounds:

1st. Because the verdict is contrary to Law and the evidence.

2d. Because said verdict is against the charge of the Court in this: The Court charged—"If the Jury believe that William B. Scott was served with a garnishment on the 30th of April, 1854, and there was no service on him while residing in Bibb County, and that said Scott was at that time a resident of Cass County, then the judgment entered for \$661 against said Scott on said garnishment is not valid against Mrs. Scott, and complainants cannot obtain a decree for the payment of said judgment." And further the Court charged—"That the recital in the answer of William B. Scott to the garnishment, that the garnishment was returnable to November Term, 1858, does not prevent Mrs. Scott from showing by the return of the Sheriff, that the garnishment was not served until the 30th of April, 1854, and if the Jury believe it was not served till April, 1854; and that Scott was then a resident of Cass County, the judgment thereon is not valid against Mrs. Scott." The Court also charged on this point, that the return of the Sheriff was to be taken as true, unless the Jury believed from the evidence that the Sheriff's return was incorrectly dated by mistake, or from some other cause, but was not conclusive, nor did it preclude complainants from showing service on Scott."

3d. Because the Court erred in charging the Jury, that if they believed there was no fraud in the transaction between William B. Scott and his mother, still, if they believed from the evidence that the Bill of Sale was given by said Scott to his mother to secure an annuity which he was bound to pay her during her life, and although absolute on its face, it was designed by the parties to be a mere sham; and if they further believe that the negroes were, at the time of said Bill of Sale, worth more than Mrs. Scott's annuity for life, then they were authorized to regard the Bill of Sale as a mortgage, and to decree that the negroes embraced in said Bill of Sale should be re-sold, and the proceeds securely investing or otherwise disposing of a sufficient amount of the proceeds of the sale to secure the payment of Mrs. Scott's said annuity promptly during her life.

Jury were authorized to decree that the balance, if any, arising from the sale, should be applied to the payment of any just debt complainants might hold against William B. Scott.

4th. Because the Court erred in admitting the evidence of the Sheriff of Troup County, as to what the man who had charge of the negroes levied on said, at the time of the levy, about William B. Scott having employed him to take said negroes to Texas.

5th. Because the verdict is erroneous in this, that it attempted to change the contract between Mrs. Scott and her son, and to substitute a new and different contract in its stead.

There were other grounds taken in the motion, but they were not relied on, and it is unnecessary to state them.

The Court refused a new trial, and counsel for defendants excepted.

LANIER & ANDERSON, and B. HILL, for plaintiffs in error.

SPEER & HUNTER, and L. N. WHITTLE, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

After carefully examining the errors complained of in this case, we are of the opinion that the decree ought to stand. It occurs to us, however, that a slight modification of the decree might be made with benefit to all parties, and that is, to ascertain by the examination of experts the present value *in gross* of the annuity coming to Mrs. Eliza Scott, by referring the matter to a special Jury; provided, counsel could not agree on the amount—and to decree, that out of the proceeds of the sale of the property, this sum be paid over to Mrs. Scott; that of the balance, if there be enough for that purpose, that Cunningham's claim be paid, and the surplus, if any, be paid over to William Scott, if there be no other liens upon the fund, and we shall send the case back, merely to have the decree re-modelled in conformity with these views.

WEATHERS vs. BARKSDALE.

If W. receives negroes of B. as a loan, and he subsequently sets up title to the property, the Statute does not begin to run in his favor until the fact of his adverse claim is made known to B.

2. The credit of a female witness may be impeached by proving her to be a common prostitute; but not by showing a single act of bastardy—especially at a period sufficiently remote as to have been repeated of by her, and forgiven by the community.

Complaint, in Talbot Superior Court. Tried before Judge WORRILL, at September Term, 1859.

This was an action of Complaint, under the form of the Act of 1847, brought by Terrell Barksdale against Francis T. Weathers, for the recovery of seven negro slaves, Sylvia and her six children.

The Jury found for the plaintiff, whereupon, counsel for defendant moved for a new trial on the following grounds:

1st. Because the Court erred in allowing the plaintiff to show by the testimony of John E. Barksdale that he, plaintiff, had not given any of said negroes to any of his children after the time of the conversation sworn to by Ligon, in which conversation Ligon swore that plaintiff said he intended to give off his negroes to his children, and let them raise them for themselves.

2d. Because the Court erred in not permitting defendant to prove by the witness John E. Barksdale, that Ann Davis, a witness for plaintiff, had had a bastard child—the Court allowing defendant to prove that she had borne a bastard child within the last two or three years, but not allowing the proof such fact to impeach her testimony after a long period of time from the birth of such alleged child.

3d. Because the Court erred in charging the Jury, that if they believed from the testimony that defendants, at any time before suit brought, claimed title to the slaves in controversy, that such claim amounted to a conveyance, which they should so find. The Court not being requested to charge, that such claim would not amount to a conveyance unless it appeared that plaintiff had notice of such claim at title.

Weather v. Barksdale.

cause the verdict was contrary to the evidence and of evidence.

cause the verdict was contrary to Law and the the Court.

gment, the Court below refused the motion for a and counsel for defendant excepted.

SLITH and A. G. PERRYMAN, for the plaintiff in

Pou, contra.

ourt.—LUMPKIN, J., delivering the opinion.

a controversy between Barksdale, the father-in-lathers, the son-in-law, whether the latter took oes from the former as a gift or a loan? The for the father-in-law, and the Judge who tried used to grant a new trial; and it is to reverse t that this writ of error is brought.

st error complained of is, that the Court per-aintiff to prove by John E. Barksdale, that the not given any negroes to any of his children a time.

may have been the object of the plaintiff in roof—and it is not difficult to understand it—d, in point of fact, prove that the plaintiff had contrary to this, in giving off two negroes ab-the period specified.

t error assigned is, that the Court refused to ndant to prove by John E. Barksdale, that witness for the plaintiff, had borne a bastard ew to impeach her credit.

was given to the defendants counsel to make ovided the bastardy was of recent date, not e think the Court went too far, instead of not gh, in allowing a single act of bastardy, how- of by the unfortunate woman, and forgiven by , to be given in evidence, to destroy the cred-itness. We know of no rule of evidence to Formerly, a witness was impeached by show-

Weathers vs. Barksdale.

ing their want of character for truth. The modern rule is, to discredit the witness by showing general bad character, or of a woman, that she is a prostitute. But that is not this case. A single mistake of this sort may occur, without indicating total depravity, whatever the self-righteous Scribe and Pharisee may say to the contrary.

3. The next ground of exception is, the charge of the Court to the Jury: That a claim of title to the negroes in dispute would not amount to a conversion by the defendant, so as to constitute a starting point for the Statute of Limitations, unless the fact was brought home to the knowledge of the plaintiff. The plaintiff's case is, that he loaned the negroes to Weathers. We do not see how the Statute could begin to run from a bare claim set up to the property by Weathers, which was unknown to Barksdale.

4. There is a conflict of testimony in the case. If Miss Davis, and Barksdale, the son of the plaintiff, are to be believed, the case is fully made out. On the other hand, the evidence for the defense is rather negative than otherwise. Witnesses, for instance, were present at the house of the plaintiff when the negroes left, and heard nothing of a loan. We cannot say that the proof is not sufficient to justify the verdict.

5. The fifth ground is disposed of in what has already been said.

COOK vs. WOOD.

ways necessary that the husband be proved to have connived at or acts of adultery charged. For if he suffers his wife to live ite, and criminal intercourse with a third person ensues, he can on. It is *damnum obsequi injuria*."

fferance, or connivance of the husband, may also be shown in vil action.'

ecessary to show connivance at actual adultery any more than y to prove an actual and specific act of adultery.

be requested, is writing, to give a legal charge, and refuses und that there is no evidence to support it, when, in fact, there it is error; and on account of which, a new trial will be award- nt was material in the case.

n Harris county. Tried before Judge WÖRRILL, m, 1858.

on was brought by Henry Wood against Elijah over damages of the latter for criminal conver- with plaintiff's wife. The defendant plead the ; and also, that for years previous to the insti- suit, plaintiff's wife was a person of loose hab- s bad character, and a common prostitute. al, the plaintiff proved by one Ransome Wood, defendant as alleged.

lant, on his part, proved by John Moore, that on had intercourse with plaintiff's wife in 1855, witnessed the act. By Joseph Dent, that plain-

him that he believed Edward Nance had had ith his wife. The witness also stated that he 'ood abuse his wife and call her a whore, that angry at the time, and greatly excited.

ore testified; that as far back as 1855, he had. F say he believed Cook kept his wife, or words he had also heard him say Cook was the man troyed his peace and ruined his happiness at stated that he knew Mrs. Wood before plain- Harris, and that her character was bad. He at plaintiff told him that when he, plaintiff, Harris, he could not borrow five dollars from

Cook vs. Wood

him, and he thought he was a mean man; but afterwards his wife could get as much money from him (Cook) as she wanted, and he thought he was a very fine man.

In rebuttal, it was proved by James Biggers that he had heard things said about Mrs. Wood both ways, but knew nothing against her. That she was received into good society, and associated with the best people in the neighborhood. Moore testified that she was a member of the Baptist Church in good standing; that there were reports against her, which had caused him to watch her close, and he had never discovered any thing improper in her conduct.

When the evidence closed, counsel for defendant asked the Court to charge the Jury that, "it is not always necessary that the husband be proved to have connived at the particular acts of adultery charged, for if he suffers his wife to live as a prostitute, and have criminal intercourse with third persons, he can have no action—it is *damnum obsequie injuria*." This charge the Court refused to give.

The Jury found a verdict for plaintiff for \$2,000, and thereupon counsel for defendant moved for a new trial on several grounds, of which the above refusal to charge was the chief.

The Rule was refused, and counsel for defendant excepted.

MOBLY, JONES & JONES, and RAMSEY, for plaintiff in error.

B. H. HILL and D. P. HILL, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion:

We avoid expressing any opinion as to the size of this verdict, except to say, that according to the actual facts of the case as proven, it was an unmistakable compliment to the rare abilities of the plaintiff's counsel.

As we feel constrained to avoid a new trial, it becomes unnecessary to notice the ground on the motion for a new trial as to the witness L. W. Biggers.

We shall confine ourselves to the refusal of the Court to give the charge requested in writing by defendant's counsel for the reason that there was no evidence to warrant it.

Cook vs. Wood.

in these words: "It is not always necessary that he be proved to have connived at the particular ltery charged. For if he suffers his wife to live ute, and criminal intercourse with a third person an have no action. It is *damnum obeque in-*

denied either by the Circuit Court, or the countent, but the Law is correctly stated. Indeed, i transcript from the 51 § of *Greenleaf in Evi-* marked in the request as a quotation. I beg d several additional paragraphs from the same *Passive sufferance*, or connivance of the husband, shown, in bar both of a libel for divorce and a

Again, "It is not necessary to show conmiial adultery, any more than it is necessary to ual and specific act of adultery."

as there not *some evidence* enough to justify the , from which the Jury might have inferred, to of it, "*passive sufferance*" of the husband in of his wife?

me of the testimony in this record?

nt swears that he knew Wood and wife in Mus- ; before their removal to Harris; that Mrs. cter for chastity, was bad. He had a converood, her husband, in Muscogee. He spoke of whore. He abused her and her sister, Mrs. aid he believed that they, and all the family, whores. This was in 1850, or 1851. Mrs. equently with her sister, Mrs. Clem. Wood ociated together, and told Dent on one occa- met him, that his wife had come down with to Columbus. Wood asked Dent on one oc- ver had sexual intercourse with his wife.— believed Ed. Nance had. He told witness on on, that when he first went to Harris County, orrow five dollars from Cook, and he thought man; but that afterwards his wife could get y from Cook as she wanted; and he (Wood) s a very *fine man*. At another time, when wife had had a difficulty, she threatened to en and become a public prostitute.

Moore testified, that Wood said to him, that

Cook vs. Wood.

he believed that when Clem's wife was out of fix, his (Wood's) wife was sent down for Dames' benefit; and when his wife was out of fix, that Clem's wife was sent up for Cook's benefit. Wood said that if Cook would settle a competency upon him and one child, he might go to the devil or Jamaica. He doubted whether more than one child was his. .

John Moore swore positively to one act of illicit intercourse between Mrs. Wood and a man by the name of Tomlinson, of which he was an eye witness.

But I forbear any further recital of these disgusting details. These are sufficient. True, I have selected some of the strongest evidence against the plaintiff, and this is right, as the point is, Was there any evidence to justify the charge asked by defendant's counsel? And when it is recollected that Mrs. Wood associated intimately with Mrs. Clem, a woman of notoriously infamous character, that her husband doubted, yea, disbelieved the legitimacy of his ostensible progeny. That he continued to live with his wife for a number of years on Cook's land, knowing, and well pleased with the fact, that she was supplied abundantly with money by him; and that he was willing to compound for the adultery, by a settlement of property upon himself and one child, might not the Jury properly have inferred that the plaintiff connived at his own undoing?

It is said that we, as an Appellate Court, cannot weigh and appreciate the testimony as the Judge who presided at the trial could. And the same suggestion is frequently made, and no doubt there is some truth in it. All we have to say in response to this remark, is, that the corrective is with the Legislature. Instead of compelling us to reverse the judgment of the Circuit Judge upon the evidence, let his decision be final upon the facts. It would greatly relieve the labors as well as the responsibility of this Court; and perhaps might better subserve the ends of justice.

In this case, an expression of opinion upon the evidence, would have been forced upon the reviewing Tribunal, under any circumstances, as the Judge refused to give a legal charge, for the reason that there was no evidence to support it.

This is the first action of *crim. con.* that has been before us. We trust it will be the last—especially when the *factum* of the adultery is proven by one witness only, and that

Cook vs. Wood.

son of the fallen woman ; and thus, instead of discovery he made, locked up in the secret chamber, thus covering the shame and naked-
 ering parent, or seizing the first weapon at his
 nd rushing upon her guilty paramour and wiped
 s hearts blood the dishonor inflicted upon the
 which prompt and manly vindication of the house-
 and the marriage bed. Earth would have pro-
 Well done," (*Penal Code 4 Division*, xvi §) and
 ld have echoed back the plaudit. Leviticus, ch.
). Instead of all this, Ransome Wood, from the
 and, in maintainance of his father's suit for pe-
 ages, publishes and perpetuates to all coming
 and degradation of the mother that bore him.
 the case of the two men in one city—the one
 other poor. The rich man had exceeding many
 erds, but the poor man had nothing save one lit-
 , which he had bought and nourished up, and it
 gether with him and with his children. It did
 n meat and drank of his own cup, and lay in
 nd was unto him as a daughter. And there
 ller unto the rich man, and he spared to take of
 , and of his own herd, to dress for the wayfar-
 was come unto him, but took the poor man's
 essed it for the man that was come to him. I
 s that case, the wrath of every right-minded
 e exceedingly kindled. And his verdict would
 e wealth of Elijah Cook could not compensate
 for this contamination of his wife. But if there
 e to be put in the testimony sent up in this
 not that case.

GREEN vs. BETHEA *et al.*

Where the owner of land through which a Road passes has permitted it to be used for that purpose, he keeping up a gate at each end to protect his plantation, the public have only acquired a restricted prescriptive right; and to that extent, and with that qualification, are entitled to enjoy it.

In Equity, from Talbot county. Decided by Judge WORRILL, at Chambers, 5th July Term, 1859.

This bill was filed by the plaintiff in error to restrain, by injunction, the defendants Bethea, Greer, and Walker, as Road Commissioners, and Hawkins as Road overseer appointed by them, from removing certain gates, erected across a certain road as plantation enclosures by plaintiff in error; also, to restrain McCurdy, a constable, from levying a *fi. fa.*, issued against plaintiff in error by said commissioners on account of said obstructions.

The bill alleges, that the plaintiff in error is the owner of the farm and lands on which he resides in said county, on a "prong of Lazar creek," about the mills once known as Carter's mills; that there is a road which is claimed to be a public road leading from Talbotton by said mills, running through complainant's land. The complainant alleges that by placing two gates across said road, one on each side of the creek, he is thereby able to protect his farm from stock: but without them, the road running as it does, would cause complainant great trouble and expense so to arrange his fence, water gaps, &c., as to protect his farm and crops from stock, owing to the high waters of the creek. For the purpose of such protection he did erect gates at the points indicated, the same being on his own land, which he insists he had a right to do, unless said road was a public one. One of these gates is on land owned by him for twenty years. He also alleges that the only order he can find establishing said road, was passed in 1847, and which is as follows:

"Ordered, that a public road be opened to lead from Talbotton by Carter's mill and across the Oak Mountain Rushes' Gap to Flint Hill as marked out by John Howard Wiley Robertson, and Archibald Helms. November 22, 1847."

her says, that for the past twelve years, as the of his farm required it, he has put up fences, the like across said road; and that at no time existence of the road has it remained open, and ing thus obstructed for the period of seven years y.

ther alleged, that said Road Commissioners have fa. against complainant for the sum of \$20.00 obstructing said road, and which has been placed s of said McCardy, Constable, to be levied, &c.; id Commissioners have caused said gates, by the er, to be removed; and that, on being replaced, ties are again about to remove them.

ant charges, that said road is not a legal road; through unenclosed ground, and that the owner has never been compensated for the land over s.

l defendants filed their answers, admitting most stated in the Bill; they, however, deny the right ainant to obstruct the road, because, they say, s been used either as a private or public road ears or longer; that the complainant can, by nce two hundred and fifty yards long, protect is farm that lies between the gates from stock, ate the necessity of obstructing said road; and le cost and labor, he could so arrange his fence s as to protect him against high water, &c.

heir answers, the defendants moved to dissolve on the ground that the answers disposed of the Bill.

ring, the complainant read in support of his its of George N. Forbes and George W. Kel- ed they were near neighbors of complainant; plainant had frequently, as occasion required ces across said road; that he did so in 1858, e remained up for several weeks, and that it other times, also within the past seven years; each year for three or four years out of the that the complainant stated at the time that p the hogs back, &c.

after hearing the motion, granted the same

Green vs. Bethea et al.

and ordered the Injunction to be dissolved, and counsel for complainant excepted.

BETHUNE, and SMITH & POU, for plaintiffs in error.

MATHEWS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This Writ of Error is prosecuted to reverse the Judgment of the Court below in dissolving an Injunction.

A road runs from Talbotton through Green's land, through the Gap in Oak Mountain to Flint Hill. It has been traveled for the last twenty years. Green, to protect his plantation, once kept a fence across the road. Subsequently he erected a gate at each end of the road. In 1847, the Inferior Court of Talbot county passed an order declaring it a Public Road. but making no compensation to Green for this appropriation of his land to public use. He has continued ever since that time to keep up his gates, as his necessities might require.

Recently the Commissioners of Roads have proceeded by fine to compel him to remove the gates; and they have given orders to the overseers to cut them down. The Bill was brought to restrain these proceedings.

It appears that the public have never, either before or since 1847, had the uninterrupted use of this road for seven years continuously. It further appears that the public never did enjoy other than a qualified use of the road. The public can take nothing by the Act of 1847, as it provides no compensation for Green. Their adverse possession under this illegal order even is not complete. Hence they cannot claim upon that ground. They can only claim by prescription. and their prescriptive right is qualified, namely that Mr. Green be permitted to keep up these gates for the protection of his property.

Our Judgment, therefore, is, that the Injunction be retained, and that so long as Mr. Green affords the facilities to the public which he does, that he should not and ~~cannot~~ be interrupted.

RUTLEDGE vs. MONTGOMERY et al.

delivery of a deed, when the grantor never parts with the deed or the paper, but retains it, concealing its existence from the defendants and intending not to put it into their custody or control.

in Talbot Superior Court. Tried before Judge [Name] at March Term, 1860.

an Action of Trover, brought by Telemachus F. [Name] and wife, and Abner Turner, Raleigh H. Tur-
liza Turner, Thomas B. Turner, Ada V. Turner
V. Turner, infants within the age of 21 years,
B. Turner, their guardian, against Thomas J.
Talbot Superior Court, for certain negroes.

Plaintiff introduced said Thomas B. Turner and his
witnesses, whereupon defendant objected upon the
ground that said Turner and wife were incompetent witness-
es on account of interest; whereupon, the said Thomas
arranged the costs satisfactorily with the Clerk,
and the Court admitted them to testify; where-
upon defendant excepted and assigned said decision as

Thomas B. Turner testified: That before he de-
livered the negroes mentioned and sued for, he made a
deed by which he gave said negroes to the wife of said de-
fendant; that she was the daughter of said Thomas B., for life,
or until the death without children, to the other plaintiffs;
that at the time said wife was dead; that said deed was written
by the witnesses; thinks that he stated to said
defendant that he had settled said property upon his daugh-
ter; that he never delivered said deed,
nor any one of the same until after the death of the
defendant, Rutledge, and that he would not let Mrs. Rut-
ledge see said deed; that the negroes were delivered to said
plaintiffs after his marriage with the daughter of

defendant testified: That she was the wife of Thomas
defendant and she informed said Rutledge before his mar-
riage that she was the daughter of witness, that all the property
settled on her would be settled on his wife.

 Rutledge vs. Montgomery et al.

The Court held, that if these facts were true, the same amounted to a delivery—whereupon, the defendant excepted and assigned the same for error.

WILLIS & WILLIS, M. BETHUNE, JOHNSON & SLOAN, for plaintiff in error.

WM. DOUGHERTY and LEVI B. SMITH, *contra*.



By the Court.—STEPHENS, J., delivering the opinion.

Dr. Turner being the original owner of the negroes, by delivering them to his daughter's husband soon after her marriage, without using any words to negative the idea of a gift, passed a good title to the son-in-law, unless he had previously divested his own title by the deed. We think the deed is invalid for want of delivery. It is said there was a delivery from Dr. Turner in his own right to Dr. Turner as agent for the grantees. There must be two parties to the delivery of a deed, but here there was only one; there must be the concurrence of two minds in the act, but here there was only one mind. But it is not true that Dr. Turner was an agent for the grantees. The objection to his agency is not that it was self-constituted, for there may be a self-constituted agent for the purpose of receiving a deed. The principal is presumed to ratify an act which is for his benefit, and when he does ratify it, the ratification, by relation, gives the transaction validity from the beginning. The facts which are fatal to the pretension of an agency in this case are, that the action of Dr. Turner was *concealed* from the grantees, and that his holding of the deed was *not* in subordination to them, but was *independent of their will*, whatever that will might be. He distinctly states not only that he concealed the transaction from all of the grantees, but that he never would have delivered the deed to Mrs. Rutledge, who was one of them. It is a mockery to say that a man takes a paper for another, when he takes it with an intent that that other shall not have it. And let it be borne in mind, that the intent of the grantor was the same as that of the pretended agent, the two being one and the same person, and therefore of one and the same mind.

it be said that this deed was delivered for the when the common intent of the person who gave e person who received it was, that the grantees t have it, nor even be informed of its existence? y must be to the grantees, either directly or me other person, who takes with an understand- e is to transfer to them the dominion which he as- heir name. There were cases produced in argu- e delivery has been *inferred* from very slight nder peculiar circumstance, but the inference has drawn against the plain facts. The facts are case, and so far from leaving room to infer a de- y conclusively negative the idea. To say that : was the agent of these grantees, when he acted rdination to their will, but independently of it, his action from them; and to say that there was o these grantees, when the paper was to be held m them, and in opposition to their dominion over to *reverse* the meaning of the terms agency and Ve will not consider the other points in this case, e not argued, and this one disposes of the case. reversed.

SORRELL vs. JACKSON.

Pamphlet, p. 243, dispensing with the *consideration*, being ten agreement to answer for the debt, default or miscar- r, is not repealed by the Act of 1856, *Pamphlet*, p. 260. This aled the Act of 1854, *Pamphlet*, p. 58, declaring that the ds and Perjuries should not operate in cases where there rmance of the agreement in whole or in part.

in Dougherty Superior Court. Tried before
at June Term, 1860.

Sorrell vs. Jackson.

The plaintiff in error brought his action against defendant on the draft of which the following is a copy :

"\$625.

ALBANY, Sept. 10, 1857.

"Thirty days after date, please pay to my own order, at Agency of the Planters' Bank State of Georgia, in this city, being an advance on my present growing crop of cotton which shall be consigned to you and proceeds applied by you to the payment of this draft.

[Signed]

"JOHN A. FREEMAN.

"To J. Jackson, Albany, Ga.

(In pencil mark at bottom.)

"Accepting fees paid in advance."

The draft was endorsed by H. H. Herring, M. Williams, John B. Vanover.

When this draft was offered in evidence on the trial, defendant objected to it on the ground, that there was no consideration expressed in the instrument itself, and it was therefore obnoxious to the Statute of Frauds, which objection the Court sustained.

Plaintiff then offered to show that the pencil mark on said draft was in the hand-writing of said defendant; and further, that said acceptance or guaranty of defendant was made in his regular business as commission merchant, and that the commissions for accepting were paid in advance— which motion the Court refused, holding that the Law requires the consideration to be expressed in writing.

The Jury found for defendant, and counsel for plaintiff excepted to the same and to the said rulings of the Court.

HINES & HOBBS for plaintiff in error.

IRWIN & BUTLER.

By the Court.—LUMPKIN, J., delivering the opinion.

Concede the writing is a guaranty and not an acceptance, still it is actionable. No consideration need be stated in the writing. *Pamphlet Acts of 1851-2, p. 243.*

And it is a mistake to suppose that the Act of 1852 was repealed by the Act of 1856, as supposed by the Compiler

laws for 1856. This latter Act repealed the Act of January, 1854, *Pamphlet*, p. 58, and not the Act of 1852 above, and which remains in full force.

These several Statutes will demonstrate this. The Act of 1856 purports to be "An Act to alter, amend and amend in Section 4th of an Act entitled an Act for the relief of frauds and perjuries." And this Act, by a plain half, it expressly repeals. The Act of 1852 is to give a construction to the 4th Section of the Statute of Frauds, so far as the same relates to a party being chargeable upon any special promise to answer the debt, default or miscarriage of a third person." The Act of 1856 manifestly, then, does not fit this Act. The intermediate Act of 1854, which the Compiler has overlooked, purports to be "An Act to alter, amend and amend in Section 4th of an Act entitled an Act for the relief of frauds and perjuries;" and this is the Act designated in the Act of 1856, and which it intended and did repeal.

The Act of 1852, dispensing with the consideration, based in the written agreement, provided the agreement was reduced to writing, is a good Act—one necessary to correct the absurd construction put by

Courts upon the Statute of Frauds and Perjuries, which the Courts in this State felt bound to follow, in my judgment. But the Act of 1854, declaring the Statute of Frauds and Perjuries should not operate where there has been a performance of the agreement in whole or in part, was of doubtful propriety; and which even lawyers might differ in opinion.

The decisions of the Courts had gone pretty far that way; not quite to the extent to which the Act of 1854 would make the payment of the money in whole or in part, such a part performance take the case out of the operation of the Statute.

But the decisions of the Courts have never been. For myself, I should have voted for the Act against its repeal.

CHEEVER vs. BROWN & BROWN.

Where the book produced, as the book of original entries, is in a mutilated condition, the entries against the defendant in the hand-writing of the plaintiff, and no witness proves that the plaintiff kept correct books, or that he knew of any dealings between the parties, the testimony is insufficient to justify a recovery.

Complaint, from Dougherty County. Tried before Judge ALLEN, June Term, 1859.

The defendants in error brought suit against William B. Cheever on an account for 840 bushels of corn at \$1 per bushel, and 50 bushels of peas at the same price.

On the trial, A. H. Brown, one of the plaintiffs in action, produced a book which he stated, under oath, to be the original book of entries of the plaintiffs; the entry against Cheever was in his (Brown's) hand-writing, and was made by him from notches on a stick, reported by William Moore as to the loads of corn delivered, and partly from his own knowledge. Moore, the overseer of Cheever, also kept a stick, and the corn was delivered to him. The book was the private memorandum book of witness, and he entered in it this transaction of the firm. He was not present when all the corn was delivered, but made the entry from what was told him. Moore received the corn for Cheever and knows all about the matter of this entry.

The book exhibited was a small pocket memorandum book, mutilated by two leaves partially torn out, one of them showing part of an entry. It contains a few scattered entries and memoranda, being for cash paid to one person for goods, to another for board of negroes, &c., time of hiring negro, corn bought of Cheever, &c.; and among them is the account for the corn and peas formally charged to Cheever, this being the only regularly stated account in the book.

Plaintiffs proved by one Hampton, that he, witness, had had one settlement of a business transaction with A. H. Brown, and found that one correct; could not say plaintiffs kept correct books; did not know they kept books; in the settlement with A. H. Brown, he had no books; he stated to witness what he said witness owed him "from his head," and the settlement was made in that way.

Cheever vs. Brown & Brown.

having been a verdict for the plaintiff, a new trial
 for on the following grounds:

1. The Court erred in admitting the book produced by
 the plaintiff to the Jury.

2d. The verdict was contrary to Law and the evi-

dence. The verdict was contrary to the charge of the Court
 The Court charged the Jury, that they would con-
 sidering up their verdict, the appearance of the
 all mutilations and appearances of incorrect en-
 tirely affect its credibility.

3d. The Court refused a new trial, and counsel for defendant

for plaintiff in error.

ER & ELY, for defendant.

Part.—LUMPKIN, J., delivering the opinion.

1. The Court erred in not granting a new trial in

the plaintiff, it is true, stated, under oath, that
 the book was delivered to Cheever. But he was then upon
 examination before the Court, and not testifying before

anything of the character and condition of the
 book, not a witness swears that he kept correct

his own knowledge of his dealings; nor does
 he see that he knew of any dealings between Chee-
 ver and Brown. To allow a thousand dollars to be recov-
 ered on such proof, would perhaps be going too far.

Kervin vs. Walker.

KERVIN vs. WALKER.

This Court will not control the discretion of the Court below in continuing an injunction after the coming in of the answer, unless such discretion has been improperly exercised.

In Equity, from Sumter County. Decision by Judge ALLEN, at August Adjourned Term, 1859.

This Bill was filed by William R. Walker against Samuel W. Kervin, the plaintiff in error, and alleges, that on the 31st day of March, in the year 1857, the said Samuel W. by various false representations and deceitful devices, induced the complainant, Walker, to purchase an assignment of a United States patent, "for a receipt with directions for making a special kind of soap, both toilet, and shaving and washing soap," from said Samuel W. and H. C. and J. W. Kimbrough, transferees of Isaac Roroback, the original patentee; that complainant agreed to purchase the right to use and vend this receipt in the counties of Pulaski, Laurens, Montgomery, Telfair and Dooly, in this State, for the sum of \$1,250, fifty of which he then paid in cash, and gave his two promissory notes for \$600 each, one payable six and the other at nine months, to said Samuel W. for the balance, and took an assignment of the said patent for said counties from said Samuel W. and H. C. & J. W. Kimbrough—the latter name being signed by said Samuel W.

The complainant further alleged, that after this purchase he went to considerable expense in preparing to use and vend this soap receipt, and in canvassing the counties specified, by himself and agents; that he had sold the receipt to others to the extent of about \$500. But, he alleges, the receipt proved a failure, and turned out to be a cheat and an imposition; that the parties to whom he sold made complaint against him to that effect, and that he had to cancel his trades with them and return what he had received from them. He states, further, that in canvassing the counties named, he found several persons, merchants and others, who had transfers of said patent from some other persons for the same article of older date than his own—the names of which persons he does not recollect, but says that if the receipt

of any value, his right to use it in the counties would have failed, owing to the superior rights of the ones alluded to.

of the Roroback patent and schedule thereto attached of the transfer to complainant, are made exhibit-Bill.

complainant also states, that at the time of the trade required him to give a bond not to disclose the mode said soap, which was done.

complainant further alleges, that the said Samuel W. brought his action at Common Law against him for the use of the said notes; that these were given without authority, in view of the fraud charged; and he prays for an injunction to restrain the suit at Law, &c. The Bill also asks for the cancellation of said bond, and the re-payment of \$50.

Answer filed by the defendant admitted the correctness of the assignment of said patent right, and of the fact; but denies all fraud and all the false representations charged, and insists that the soap receipt is not as charged, but is, in his belief, all it is represented in the patent. It is further answered, that the defendant is entitled to use and vend the receipt in the manner specified is perfect under the assignment from him.

C. and J. W. Kimbrough. Defendant says he believes there are other parties using and vending the receipt in any of said counties; certainly none under the name of the complainant; and if there be any such persons, they are without authority. He also says, that he heard nothing until after the notes were sued; that complainant expressed his satisfaction with the trade, and that he received several thousand dollars by vending the patent.

He denies the institution of the suit as charged, and denies the statements as to fraud and want or failure of the receipt in the Bill. He also says, that at the time of the institution of the suit, the complainant stated to him that he, complainant, was satisfied with the receipt for making soap, as he had an individual right, and was satisfied as to its value. He was made by counsel for defendant to dismiss the bill, and dissolve the injunction on the coming in of the answer on the following grounds:

Kervin vs. Walker.

- 1st. Because there was no equity in the Bill.
- 2d. Because it was apparent upon the Bill that the complainant had a full and adequate remedy at Law.
- 3d. Because the answer swore off all the equity, if any, in the Bill.

The Court overruled the motion, and defendant excepted.

SCARBOROUGH, LANIER & ANDERSON; for the plaintiffs in error.

MCCAY & HAWKINS, for defendant.

By the Court.—LYON, J., delivering the opinion.

It is a well-settled rule of this Court, that the granting and continuing the process of injunction must always rest in the sound discretion of the Court; to be governed by the nature and circumstances of the case; and this Court will not control that discretion unless it is quite apparent that it has been improperly exercised. And there is nothing in this case that makes it necessary for us to interfere with that discretion in refusing to dissolve the injunction on the coming in of the answer.

The Common Law remedy is not so adequate; for this Bill will settle all the questions between the parties, the cancellation of the notes and bonds, the restitution of the amount paid—all of which the defense to the suits on the notes would not accomplish.

Judgment affirmed.

Hawkins vs. King.

HAWKINS vs. KING.

There can be no deduction from the agreed price of a negro on account of unsoundness, when the negro was sold without either a warranty or representation of soundness.

In Webster Superior Court. Tried before Judge PERKINS, March Term, 1860.

This was an action of *Assumpsit* by King against Hawkins, on a promissory note for \$450, dated 7th January, 1856, payable 25th December thereafter to Sterling Clark or bearer. The note was transferred by Clark to plaintiff for valuable consideration before its maturity.

The defence was, that the note was given by defendant as part of the price and purchase money of a negro boy, Sam, bought of Clark, and that said negro was unsound at the time of said purchase, and that the consideration of the note had failed.

Plaintiff being examined by defendant as to the interest which he had in the note originally, when it was made, stated, that himself and Clark, who was his son-in-law, attended a sale of an estate in Jefferson County; Clark bid off a negro woman at the sale for \$900, but being a stranger, he was unable to comply with the terms of sale by giving the security required; plaintiff took the bid off his hands and gave a note for the \$900, which he afterwards paid; plaintiff and Clark were interested in said property as heirs at Law; Clark afterwards, without plaintiff's authority, traded the woman to Noah Hudson for this negro boy Sam, receiving one hundred dollars to boot; plaintiff was not pleased with this trade, and told Clark that he must pay him \$900 for the woman; plaintiff did not like the boy Sam; he was a *simple* negro, and looked weakly, but plaintiff thought him sound, but he was not the kind of negro he could like; saw a scar on his leg; shortly after this Clark told the boy to defendant for \$900, taking two notes, one for \$450, due one day after date, and the other (the note paid on) due 25th December thereafter, and Clark, a few days thereafter, gave and turned over said notes to plaintiff in payment of the \$900 which he owed plaintiff for the ne-

Hawkins vs. King.

gro woman ; a month or two after this, defendant paid plaintiff the first note which was due ; the note sued on was not due when Clark traded or turned it over to plaintiff.

Several witnesses were examined on both sides as to the condition and soundness of the negro before, after, and at the time he was sold by Clark to defendant. Amongst others, plaintiff introduced Noah Hudson, Clark's vendor. Defendant objected to his competency on the ground of interest. The Court overruled the objection and the witness was examined.

The Jury found' for the plaintiff the amount of the note, and interest, and cost. Whereupon, counsel for defendant moved for a new trial on the following grounds, viz :

1st. Because the verdict was contrary to the charge of the Court.

2d. Because the verdict was strongly and decidedly against the weight of the evidence.

3d. Because the Court erred in admitting the testimony of Noah Hudson.

4th. Because the Court erred in charging the Jury, that if they believed that the negro was unsound before and after the sale, yet if he was sound on the day of sale, then they must find for plaintiff ; and that defendant must prove that the negro was unsound on the day of sale ; but that they must consider the condition of the negro both before and after the sale, to enable them to ascertain and determine his probable condition at that time.

The Court refused the motion for a new trial, and counsel for defendant excepted.

W. A. HAWKINS, for plaintiff in error.

REDDING, WIMBERLY and B. S. WORRILL, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

A single view disposes of this case. There was not the slightest evidence of either a warranty or a representation of the soundness of the negro, and, of course, there can be no deduction from the price on account of unsoundness. The defense to the action has not the least foundation.

Judgment affirmed.

Macon & Western Railroad Company vs. Lester.

& WESTERN RAILROAD COMPANY vs.
LESTER.

will not be set aside where, in a conflict of evidence, the weight
the verdict.

are not trespassers on unenclosed lands in this State.

om Bibb County. Tried before Judge LAMAR,
Term, 1859.

is Lester brought an action on the Case to recov-
laintiff in error damages for a horse alleged to
un over and killed by the cars of said Company,
on & Western Railroad.

ial, plaintiff, Lester, introduced William H. Ber-
tified: That he was standing and looking at the
19th day of December, 1855, between 8 and 9
s in a house some fifty or sixty feet from the
looking at the light in front of the engine; saw
lf a mile distant; the cars were coming towards
down grade; there was nothing to obstruct the
beast on the road; saw it run some fifty yards
eeing it, when it passed out of witness' sight;
it was killed; it was left on the crossing; no
p the train until it struck the crossing; it ran
five hundred yards before it stopped after pass-
ing. The horse was struck some forty or fifty
e crossing, and was carried some fifty yards by
e train was running about twenty miles per
orse was loose, without anything on him; did
e track until he was knocked down; witness
w how far the train was from him when he first
se; saw the horse by the light of the lamp in
engine; not more than a minute or a minute
om the time he saw the horse until he disappear-
ing was not a public crossing, but was built
Valkenberg by the consent of the Railroad Co.
eighbors west of the railroad used it as a cross-
nal referred to was a small dark bay mare;
is not blown till after the mare was struck and
reached the crossing.

Macon & Western Railroad Company vs. Lester.

William H. Cason testified for plaintiff: That he saw the animal next morning after it was killed; it was the property of Rodolphus Lester; knew her well, and was worth \$200; witness had put it in witness' lot; the fence was a good one, but the mare broke out; it was a bright, moonlight night, the moon near its full; the mare went on the railroad at the crossing, and then up it 440 yards; it then turned and walked back some distance, then trotted, and then ran; ran some 200 yards before it was struck; it ran so fast as to leap three or four cross ties at a time; it was struck thirty yards above the crossing; the crossing was used as a public one; Van Valkinberg's steam mill is near it, and Ralston's mill is reached by it; it is some three miles from Macon, and much used by the public; witness was not present at the accident; saw it the morning after; the railroad where the accident happened is straight some eight or nine hundred yards; there was no obstruction; the road was on an embankment from four to twelve feet high and down grade.

Warron Riley testified: That he examined the road with Cason—and the balance of his testimony is in substance the same as Mr. Cason's as to the description of the road, the movements of the horse, &c.

William Berry, recalled, testified: That he was a fireman on the railroad; a car going on an up grade cannot be stopped under from 50 to 200 yards; on a down grade, not under from 100 to 300 yards; running down grade, it could not have been, if all the appliances were used, in fifty yards: from the tracks the mare made, she was not running at full speed; such a horse as this would run a mile in three minutes when at full speed.

The plaintiff having here closed, the defendant proved by John Nott: That he was engineer on defendant's train at the time specified when a horse was run over and killed by the train; was rather behind time; the engine was running at usual speed; the accident occurred at about 30 minutes past 8 o'clock, P. M.; the train had approached within about forty feet of the horse before deponent saw him; and was struck down in a moment, and witness could not have stopped the train before the accident; the horse was loose and running on the track when he saw it; there was no carelessness on witness' part, nor of any of the conductors

Macon & Western Railroad Company vs. Lester.

of the train; the accident could not have been all was done that could have been done under the circumstances; notwithstanding the time was so short before the time of his seeing the horse and the collision, he diverted the engine, and did all he could to prevent it; the engine had hooks in front on which the horse caught and dragged about 100 yards before the horse could be stopped; on a clear night the head light cast its light 100 to 150 yards in front of the engine; on a foggy night it could not cast it so far; and the fact that the horse was not sooner seen was that it leaped out about 40 feet from the train, and had not been there previously to that; directly ahead of the train the light will be thrown so that an object the size of a horse could be seen at the distance of 100 yards, but not from the track.

Once having closed, the Court charged the Jury: the question for their determination was, whether the defendant was guilty of the want of ordinary care. If he was liable for the value of the horse and interest, that if both parties were equally guilty or innocent, then the defendant was not liable; that as the railroad not being a public highway, the defendant was not obliged to erect blow posts; and the fact that the horse was killed near the crossing had nothing to do with the liability of the defendant. Yet, the defendant, that the crossing was used very frequently, was that his engine under such control as to be able to prevent it should be any person or thing on the road.

The Court found for the plaintiff a verdict for \$260; counsel for defendant moved a rule for a new trial on the ground, that the Jury found contrary to the evidence, and strongly against the weight of the evidence. It was also, because the Jury found contrary to the justice of the case, and against the charge of the Court.

The Court refused by the Court, and counsel for defendant.

Plaintiff in error.

ENTER, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

1. If the engineer's version of this case be the true one, it was an unavoidable accident; but if the version of the other three witnesses is to be taken, it was a case of gross negligence, not to say of wanton outrage. The sum of their testimony is, that the horse ran before the engine, gradually increasing his speed, about 400 yards before he was struck, in a bright moonlight night, and in the full blaze of the head light, and yet that there was no slackening in the speed of the engine. These facts are suggestive of a *race* after the horse, and much more than suggestive of an utter indifference as to his fate. We cannot set aside a verdict which is so well supported by three witnesses who do not appear to have been otherwise than impartial, because it is contradicted by one witness whose connexion with the affair laid him open to a fair suspicion of bias.

2. But it was said, that whatever may have been the negligence of the engineer, the owner of the horse was in *per delicto*, in allowing his horse to go at large; that he, through his horse, was a trespasser on the road. Such Law as this would require a revolution in our people's habits of thought and action. A man could not walk across his neighbor's unenclosed land, nor allow his horse, or his hog, or his cow, to range in the woods nor to graze on the old fields, or the "wire grass," without subjecting himself to damages for a trespass. Our whole people, with their present habits, would be converted into a set of trespassers. We do not think that such is the Law. Where a whole country abounds in loose stock, he who wishes to protect his land from their visits, must enclose it; and where, as in our State, a form of fence is prescribed, he must enclose it with a lawful fence. Every man consents to what is universal in the country where he is, until he expresses his dissent in a form to give notice of it to the public, and where there is a mode prescribed, he must pursue that mode.

Judgment affirmed.

APPLEWHITE vs. BALDWIN et al.

on must be dissolved when the answers swear off all the equity of

ity, in Terrell County. Decision by Judge PER-
Chambers, 26th January, 1860.

aintiff in error filed his Bill in Equity, alleging,
e year 1856, John A. Freeman, Deputy Sheriff of
ty, levied upon lot of land No. 120, in the 12th
said county, as the property of the complainant
a fi. fa. for the principal sum of \$100 against com-
favor of Parsons & Evans; that Moses H. Bald-
ff the lot on the day of sale for \$36; that it was
understood between complainant and Baldwin,
tter would relinquish his bid to the former, provi-
ainant should pay up said fi. fa., which complain-
ards did; that Baldwin had never paid any part
nor received a Deed from the Sheriff for the lot;
e of the sale the land was vacant, but since the
with Baldwin, complainant has entered on and
e lot for a considerable time with the knowledge
, and continues in possession. It is further sta-
e lot lies within one-fourth of a mile of Powers'
the South-western Railroad, and of Brown's
Mills, and derives the greater part of its value
e timber on it; that said Baldwin, although he
ecognised said agreement, and knowing he had
he lot, and that complainant held it in his own
ed into some arrangement with one Samuel Den-
interested in said steam saw mill, under which
H. is cutting and carrying away the timber off
for the use of said mill, and is thus committing
le injury, &c.

unt charges, that since said arrangement with
dwin made application to said Freeman, who is
office, for a Deed for said lot; that Freeman is
cute a Deed therefor, and date it as of the day
Prayer for perpetual injunction.

dants answered severally:

Appelwhite vs. Baldwin et al.

Baldwin answered, admitting the sale and purchase by him as stated in the Bill; but denies the agreement as to the transfer of his bid as charged, and says that he had no interest in the fl. fa. under which the land was sold; but that he had a fl. fa. of his own of older date under which he claimed the amount of his bid, to be entered as a credit thereon; and that said Deputy Sheriff had funds of his, Baldwin's, in hand for the payment of the amount of his bid; complainant knew he, defendant, had settled the amount thus due by him, as was shown by complainant's acts afterwards; no permission was given complainant to enter on the land after the sale; any acts of ownership exercised on his part were unknown to defendant; complainant knew that defendant, Baldwin, claimed the lot; it is denied that anything was said about ante-dating the Sheriff's Deed; since the sale, defendant, Baldwin, has sold the lot to said Denton; denies all fraud and confederacy.

The answer of Samuel Denton states, that Denton bought and paid for the land, supposing Baldwin had a good title: he denied that complainant was in possession, but says that one Watson was in possession, being put there by said Baldwin shortly after the sale, and had continued in possession ever since, until he, Denton, bought the land.

The answer of Freeman, former Deputy Sheriff, corroborates the statement of Baldwin in relation to the sale and the settlement by Baldwin, as stated, of the amount for which he bid off the land; Freeman also states that he supposed his successor in office had made a deed to Baldwin for the said lot.

On hearing the motion to dissolve the injunction, on the coming in of the answers, the complainant offered to read to the Court an affidavit of said Watson, in which Watson stated that he occupied said lot as the tenant of complainant for some years previous to the preceding Christmas, and had not held under any other person.

The Court rejected the affidavit, and complainant excepted.

The Court, after argument, passed an order dissolving the injunction, and complainant excepted.

—, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

These answers most distinctly swear off all the possible equity in this Bill, with the affidavit of Watson included, and the injunction was properly dissolved.

MASON, DICKINSON & CO. vs. CARHART, BROTHER & CO.

The Justices of the Inferior Court have power, on application to them by a defendant in *ca. sa.* who is in jail, to order his discharge, when it appears that the plaintiff in *ca. sa.* has failed to give security for the weekly payment of jail fees; and to order the discharge without any notice to the plaintiff in *ca. sa.*, except where the defendant has gone to jail after being surrendered by sureties.

Motion, &c., from Baker County. Decided by Judge ALLEN, May Term, 1860.

The plaintiffs in error having severally been arrested by the Sheriff of said county on three *ca. sas.*, one of which was in favor of Carhart Brother & Co., all issuing out of the Superior Court, petitioned the Inferior Court for their discharge on the ground, that none of the parties plaintiffs or their attorneys at Law resided in said county, and that they had failed to give bond for the maintenance of defendants in terms of the Statute in such cases made and provided.

The Inferior Court at Chambers entertained the petition, and ordered the defendants to be discharged upon the grounds stated, and afterwards, at the July Term of said Court, counsel for Carhart Brother & Co., moved said Court to vacate the order discharging the defendants, because the

Mason, Dickinson & Co. vs. Carhart, Brother & Co.

prisoners were not in jail, were not brought before the Court by *habeas corpus*, and because no notice was served on the plaintiffs or their counsel of such application; because want of residence of said parties in the county was no ground for discharge, and because the Court had no jurisdiction of the case.

This motion was refused by the Inferior Court.

Afterwards, at the May Term of the Superior Court, counsel for Carhart Brother & Co. moved a rule against defendants, requiring them to show cause why they should not be arrested on said ca. sas. They shewed, in answer, the foregoing proceedings.

After hearing the motion, the Court passed an order declaring the proceedings of the Inferior Court null and void, and directing said ca. sa. to proceed as though no such proceedings had been had.

Counsel for defendants excepted thereto and assign the same as error.

LYON, for plaintiffs in error.

HINES & HOBBS, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

These defendants in ca. sa. were discharged by the Justices of the Inferior Court on petition to them, upon the ground that the plaintiffs in ca. sa. residing out of the county, had failed to give security for the weekly payment of jail fees. The Act of 1808, *Cobb Dig.* 382, authorizes the Justices of the Inferior Court to do just what these Justices did, without notice to plaintiffs in ca. sa., and without *habeas corpus*, but simply upon application. The Act manifestly contemplates no notice. Notice could have no effect, for no excuse for the failure to give security can avail. The discharge is to be ordered on the simple fact of the failure. There is another Act of 1845, *Cobb Dig.*, 391, which does require notice, under different circumstances from those contemplated by the Act of 1808, when notice is very proper, and where action without notice would be very unjust. When the defendant is in process, whether mesne or final, has

Smith vs. Bell.

given security, and has been delivered up by his sureties, then he cannot be discharged for failure to secure jail fees without ten days' notice to the plaintiff. A creditor is not required to provide for the jail fees of his debtor when the debtor is not in jail, and when he afterwards gets in jail by the act of his sureties, the creditor ought to have notice of the fact before he is required to make provision for it. But there is no reason for notice, and no notice is required when the debtor goes to jail as soon as he is arrested. The plaintiff who orders the arrest knows the fact. We think the judgment of the Inferior Court was right, and that the judgment of the Superior Court, in effect reversing the other, was wrong.

Judgment Reversed.

SMITH vs. BELL.

"McINTOSH, 3d February, 1855.

"MR. TENDERSON SMITH, Esq.—SIR: If Henry Weaver should purchase any of the negroes of Langford's estate, I expect to stand his security if he desires it, and will be taken; and I shall not be present on your sale day, but will attend to it at any time.

Yours respectfully,

[Signed]

"SAMPSON BELL."

Weaver having bought property upon the credit of this letter at Langford's sale, and Bell, when called upon, refusing to become his security: *Held*, that the letter was actionable.

Assumpsit, in Webster Superior Court. Tried before Judge PERKINS, at March Term, 1860.

This was an action of Assumpsit brought by Tendersen Smith, as executor of James Langford, deceased, against Sampson Bell, on the following written instrument or letter, viz:

Smith vs. Bell.

"McINTOSH, February 24, 1855.

"Mr. Tonderson Smith, Esq.—Sir :

"If Henry Weaver should purchase any of the negroes of Langford's estate, I expect to stand his security, if he desires it, and will be taken; and I shall not be present on your sale day, but will attend to it at any time.

"Yours respectfully,

"SAMPSON BELL."

The declaration alleged that the negroes of the estate of Langford were sold by the plaintiff, as executor, on the 3d day of February, 1855, and that a negro woman named Jane, and her child, was put up to the highest bidder, and bought by the said Henry Weaver at and for the price of thirteen hundred dollars; that plaintiff delivered said negroes to Weaver; that the terms of said sale were a credit till 25th December, 1855, with notes and two approved sureties; that Weaver gave his note for the purchase money with Henry Spear as one of said sureties; that plaintiff afterwards called on Bell to sign said note as surety, which he refused to do, whereby plaintiff is damaged, &c.

To the declaration defendant demurred on the ground, that the facts therein stated and set forth constituted no cause of action.

After argument, the Court sustained the demurrer and dismissed the action, and counsel for plaintiff excepted.

BLANDFORD & CRAWFORD, and E. W. MILLER, for plaintiff in error.

MCCAY & HAWKINS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We think the letter written by Bell actionable. The case of *Laurason vs. Mason*, 3 *Cranch*, 492, 493, was more indefinite than this. Yet the Supreme Court of the United States held the writer of the instrument bound. And we concur in the opinion of Chief Justice Marshall, who said in that case: "This letter was intended to give notice to the person to whom it was addressed, and the writer is

Hardee vs. Williams and Applewhite.

every principle of rectitude and good faith, to fulfillment thus raised, and which induced the plaintiff with his property."

DEE vs. WILLIAMS AND APPLEWHITE.

question submitted to the Jury is one of fact only, the Court will disturb their verdict.

party to the case is the only witness, and his testimony makes of his adversary, and then states matter in rebuttal or avoid-competent for the Jury, under the Act of 1857, to credit the first against the party, and disregard that in his favor.

and Issue of Payment, in Terrell Superior Court.
the Judge PERKINS, at November Adjourned Term,

is an issue made up in this case to try the question the fi. fa. in favor of plaintiff in error against was paid off and discharged or not—the issue ended at the instance of other creditors of defendant.

rial, the following *transfer* of the fi. fa. was put

A. HARDEE

vs.

V WILLIAMS &
APPLEWHITE.

Fi. Fa. from Terrell
Superior Court.

[. Baldwin has paid the sum of one hundred and fifty dollars on the above stated fi. fa, under the hat the same is not to be discharged, but that he t to control said fi. fa. and judgment in the name

Hurdee vs. Williams and Applewhites.

of the plaintiff for the purpose of re-imburssing himself fully thereby—10th September, 1857.

[Signed]

"VABON & DAVIS,
"Plaintiff's Attorneys."

Defendants then introduced Moses H. Baldwin, who testified: That he had a settlement with Matthew Williams in 1857, and he thinks, after the transfer of the fi. fa.; it was at or after Fall Court, 1857; paid Williams some money in that settlement; does not recollect how much; to the best of his recollection, this fi. fa. was not included in the settlement, but would not swear positively that it was not; after the transfer of the fi. fa. the same with the transfer was placed by witness in an old pocket book that he did not use much, and after the settlement with Williams, found said fi. fa. and went to Williams and asked him whether it was included in the settlement; Williams did not answer; at the said settlement, witness turned over all the papers that were settled to Williams, which did not include said fi. fa.; the settlement was final for all papers turned over, subject to correction for any mistake; he did not believe this fi. fa. was included in the settlement; it was understood that any errors in the settlement were to be corrected; this fi. fa. was paid by witness for the purpose of relieving the Sheriff.

The Jury found the issue in favor of defendants. Whereupon, counsel for plaintiff moved for a new trial on the ground, that the Jury found contrary to Law and the evidence, and contrary to the charge of the Court in this: That if the Jury believe from the evidence that the fi. fa. was not included in the settlement between plaintiff and defendants, then they must find for the plaintiff.

The Court overruled the motion, and counsel for plaintiff excepted.

STROZIER & SMITH, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The only question in this case is, whether the amount transferred by the attorneys of Hurdee to Baldwin was not

Wall et al. vs. Shippard and Chambliss.

ished? And Baldwin himself, the assignee, was the only witness examined on the trial. He admits, that subsequent to the transfer of the *fi. fa.* to him, he had a settlement with Williams, and that upon that settlement he paid over some money to Williams. He cannot swear positively whether the execution was included in the settlement or not. He thinks it was not, and assigns reasons why he thinks so. So uncertain, however, was he about it, that he called on Williams to know whether the *fi. fa.* was included in the settlement, and he says Williams refused to answer. The Jury found the execution satisfied; the Judge refused to grant a new trial, and we do not feel constrained to overrule his judgment.

The Act of 1857, authorizing parties to be examined at Common Law, "under the same rules and regulations prescribed by Law for other witnesses," has the provision, "and the testimony of the parties shall be entitled to such weight and consideration with the Jury as they, under all the circumstances, may see fit to give it."

It was competent for the Jury to believe so much of the testimony of Baldwin as proved the settlement between Williams and himself, and disregard or disbelieve the reasons he assigned why this execution was not included and paid.

WALL *et al.* vs. SHIPPARD AND CHAMBLISS.

When a case is reached against a garnishee who has not answered, he is entitled to be called; and if he then appear and depose, it is in time. And were it otherwise, if the plaintiff enters up judgment against the garnishee for the amount admitted in his return, that will amount to a waiver of the irregularity.

Garnishment, from Marion Superior Court. Decision by Judge WARRILL, September Term, 1859.

Wall et al. vs. Shippard and Chambliss.

A summons of garnishment was served on John T. Chambliss, requiring him to answer at March Term, 1866. The garnishee having failed to answer at that Term, the case was continued. On the second day of the next Term of the Court, the case having been regularly called, and no answer having then been filed, it was moved to enter up judgment against the garnishee, Chambliss, for the full amount of principal, interest and costs due on the judgment held by the plaintiffs. The Court refused the motion and allowed the garnishee to be called into Court, and to prepare and file his answer after being called and after coming into Court—to which counsel for plaintiffs excepted.

ELAM & OLIVER, for plaintiffs in error.

BLANFORD & CRAWFORD, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We cannot doubt but that the Court was right in allowing the garnishee to be called for the purpose of answering the summons. And this case differs from the one cited by counsel as decided by this Court in this: That there the case was called in its order, and neither the principal nor the security appearing, judgment was entered up upon the bond against both, which the Court very properly refused to have vacated on account of the subsequent appearance of the parties.

But here no judgment had been entered. The garnishee answered when called, and filed his return to the summons.

But apart from this, the plaintiffs' counsel entered up judgment against the garnishee for the amount admitted by him to be due. Has he not waived his objection to the irregularity of the proceeding? It would seem so.

COCK AND THOMPSON vs. BROWN & CARMICHAEL.

A. Borrows \$1,000 of B., and promises to return it in ten days or send B. a note for \$5,000 which he holds on C.: *Held*, That in the absence of positive proof as to the nature of the transaction, it will be construed into a security for the \$1,000 borrowed and not an absolute transfer of the \$5,000 note. Equity would relieve against such a contract, if satisfactorily proven; the ten days within which the money was to be returned, not being of the essence of the agreement.

New Trial, from Sumter County. Decided by Judge ALLEN, at October Term, 1859.

The plaintiffs in error brought an action of complaint to recover from defendants a promissory note for \$5,850, alleged to have been in the possession of the latter, to which he former claimed title by transfer from the payee, James L. Rouse. G. C. Carmichael was the maker of it.

On the trial, plaintiffs put Henry H. Brown, one of the defendants, on the stand, who testified: That he had seen the original note sued for in possession of defendants; the payee, Rouse, came to witness at his place of business at Americus, and said he must have \$1,000, and asked witness to let him have it, and stated that he would send it back by G. C. Carmichael, who was then at the plantation, he, Carmichael, had a short time before purchased of said Rouse, and where Rouse then resided, and who would return in the course of ten days, or in the event he should not do this, he would give witness a promissory note due by Carmichael to Rouse for the payment of his land; witness let Rouse have the \$1,000 on the above terms. (Described the note in controversy.) When Carmichael returned, which he did in a few days, he did not bring back the money, at which witness was much surprised, and he was informed by Carmichael that he had not seen Rouse. About two weeks thereafter, witness met Rouse in the street, and when witness got within speaking distance of him, Rouse ran his hand in his pocket and took out a sheet of paper wadded up, and stooped down and unrolled it upon his knees, and what witness saw was the promissory note that Carmichael had given him for his land and negroes; and Rouse then tore off the top note

Cook and Thompson vs. Brown & Carmichael.

and remarked, that he always had been as good as his word and would remain so, and gave witness the note—being the note in controversy. Rouse never afterwards set up any claim to the note to witness, and witness always claimed the note. Witness never afterwards saw Rouse to have any conversation with him; witness considered Carmichael good at the time he took the note of Rouse; a day or two before this suit was brought, plaintiffs and Mr. Hawkins came to him with a roll of money and demanded the note, and offered to pay back the \$1,000 and interest thereon; witness then agreed to waive all legal formalities as to demand, tender, &c.

Plaintiffs also put in evidence an order from Rouse, the payee, to Brown & Carmichael in favor of plaintiffs for said note—the latter to pay up the \$1,000 advance. Plaintiffs then closed.

There having been a verdict for defendants, plaintiffs moved for a new trial on the ground, that the verdict was contrary to Law and evidence; which motion was overruled by the Court, and counsel for plaintiffs excepted.

McCAY & HAWKINS, for plaintiffs in error.

B. HILL, for defendants.

By the Court.—LUMPKIN, J., delivering the opinion.

We think the verdict strongly and decidedly against the evidence in this case. Indeed, we see no proof whatever that Rouse intended to transfer absolutely the \$5,000 note for the \$1,000 which he borrowed of Brown. It should be clear and unequivocal proof to support such a transaction. When he got the money, he promised to return it in ten days, or send the \$5,000 note by Carmichael—neither of which he did; but the first time he met Brown, he demanded him the note, with the declaration, that he meant to be as good as his word.

And now, it is insisted, that instead of treating the note as security, only, for the money borrowed, Rouse is to be adjudged to have forfeited \$5,000 for not returning the \$1,000 in ten days, which he borrowed. Equity would not believe against such a contract if actually made.

The plaintiffs, as holders of this note payable to bearer, were entitled to sue in their name, not thereby depriving the defendants of any rights of defense which they might have against Rouse.

BROWN vs. BRADFORD *et al.*

In an action on a Sheriff's bond for a breach of his official duty, his sureties may avail themselves of a prior judgment, rendered in favor of the Sheriff on a rule for the same alleged breach of duty.

Debt, in Muscogee Superior Court. Tried before Judge WORRILL, at November Term, 1859.

This was an action of Debt brought by the Governor of the State of Georgia, for the use of Ann Adams, executrix of Patrick Adams, deceased, against William H. Lamar, Sheriff of Muscogee County, and James H. Bradford and others, the Sheriff's securities on the official bond of said Sheriff.

The declaration states, that at the February Term, 1856, of the Inferior Court of said County, the said Ann Adams, executrix as aforesaid, recovered a judgment against William B. Brown for \$284.78, besides interest and cost, upon which a *fi. fa.* issued, returnable to August Term, 1856, of said Court; and that said *fi. fa.* was placed in the hands of said Lamar, as Sheriff of said county, who failed and neglected to execute and return said *fi. fa.* to the Return Term thereof.

There was a second count in the declaration, that said Lamar collected of said Brown the full amount of said *fi. fa.* which he fails and refuses to pay to plaintiff, although requested so to do.

Brown vs. Bradford et al.

The defendants pleaded the general issue, but in their defense relied upon a former proceeding, verdict and judgment had upon a rule taken out by the same plaintiff against the Sheriff, to shew cause why he should not be attached for not paying over the money collected on this *fi. fa.*

Lamar, the Sheriff, died pending suit, and the action proceeded against the securities.

At the trial, plaintiff offered and read in evidence the Sheriff's official bond. He next introduced in evidence the *fi. fa.*, with the entries thereon. He further proved a demand upon the Sheriff, before suit was brought, for the money, and here plaintiff closed.

Defendants then offered in evidence the *rule nisi* against the Sheriff, his answer thereto, the traverse of the answer by plaintiff, the issue, verdict and judgment—which verdict and judgment were in favor of the Sheriff. The plaintiff objected to the introduction of this evidence, which objection was overruled by the Court and the testimony admitted, and counsel for plaintiff excepted.

Plaintiff admitted that the *rule nisi* and proceedings thereon referred to the same *fi. fa.* which was the foundation of this action.

The Court charged the Jury, that the verdict and judgment in the proceedings upon the rule against the Sheriff, was a bar to the present cause of action, and that plaintiff could not recover—to which charge plaintiff excepted.

The Jury found for the defendants; whereupon counsel for plaintiff tendered their bill of exceptions, assigning as error the rulings and charge aforesaid.

JOHNSON & SLOAN, for plaintiff in error.

WILEY WILLIAMS, *contra.*

By the Court.—STEPHENS, J., delivering the opinion.

The sole question here is, whether or not the securities of the Sheriff can avail themselves of the former judgment in favor of their principal, they not being parties to that judgment. We think they can. The Sheriff could, beyond doubt, protect himself by the judgment, and when he is

Mountain vs. Rowland & Ansley.

clear, we think his excuses are clear. Their responsibility is for his default, and he is in default when he acts *against* the judgments of the Courts, and not when he acts in conformity with them. He was not in default in refusing to account again for this money, *after* there was a judgment of the proper Court that he had already accounted for it once, and was not bound to account for it any more.

Judgment affirmed.

MOUNTAIN vs. ROWLAND & ANSLEY.

Where a plaintiff dismisses his action during vacation, under the Act of 1843, and the Clerk neglects to make entry of the fact, the omission may be cured at the next term of the Court, by a *nonne pro tunc* entry.

Complaint, in Sumter Superior Court. Tried before Judge ALLEN, at April Term, 1860.

This action was brought by Rowland & Ansley, the defendants in error, against Miles Mountain, to recover the amount claimed to be due on an account.

In the progress of the trial, the defendant offered to prove by the attorney of the plaintiff in the action, that a suit for the same cause of action had been commenced prior to the present suit, and was still pending between the same parties. The competency of the witness was objected to, and sustained by the Court, on the ground that all he knew of the matter came to his knowledge as plaintiff's counsel.

Defendant then put in evidence an order, which appeared of record, which stated the case between said parties, and dismissed the same at April Term, 1860.

Plaintiffs then introduced A. J. Ronaldson, clerk of said Court, to prove that the suit to which the order—put in evi-

Mountain vs. Bowland & Anselby.

dence by defendant—related, was dismissed in vacation prior to the commencement of the present suit; and that he forgot to make the entry. To which defendant objected—there being no entry on the Bench docket, or on the minutes of the Court, showing such dismissal by the clerk, but both cases stood open unstricken on said docket at April Term, 1860.

The Court overruled the objection and admitted the evidence; and an order was then passed reciting the facts and requiring the former order to be entered on the minutes of the Court *nunc pro tunc*. To which defendant excepted.

WORBILL & HAWKINS, for plaintiff in error.

A. R. BROWN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

By the Act of 1848, (*Cobb's Digest*, 475) plaintiffs are authorized to dismiss their actions during the vacation of the Superior, Inferior, and other Courts, on the same terms they are now authorized to dismiss actions at the regular terms of said Courts: "*Provided*, That such dismissal shall be first entered on the docket by the clerk of the Court in which said suit may be pending during the vacation of said Court."

It is not denied but that all was done which the law requires to be done by the plaintiff in this case, but the clerk, as he states, omitted to make the entry in his office as required by the Statute. We think the Court was right in allowing the entry to be made *nunc pro tunc*.

KETCHENS vs. HOWARD.

an equity charged in a Bill, the defendant only interposes a denial of information and belief, the injunction will not be dissolved. The injunction will be totally, or partially, dissolved according to the exigencies of the case.

in Equity, from Terrell Superior Court. Decided PERKINS, May Term, 1860.

As a bill filed by John T. Howard, alleging that on the day of January, 1860, he purchased of the plaintiff, a settlement of land, consisting of four lots, in all, for \$11,000, for which he gave him his four notes, each payable in one, two, three, and four years respectively; that directly after the purchase, Ketchens refused to him a deed executed by Moses H. Baldwin, a question arose as to the true character of the deed, Ketchens saying it was only a quit claim deed, which he admitted, but stated that Baldwin had agreed to execute a warranty deed, and that he would get him such a deed. Upon the faith of this assurance, Ketchens consented to give his notes, which he would not have done if he had known the defendant being a man of limited means, and depending upon a warranty. Complainant charges that Ketchens failed to get said warranty deed, and that he has ascertained there are *fi. fas.* to the amount of \$10,000 or \$9,000, to the payment of which the land is subject, and that there are two *fi. fas.* amounting to some \$4,000 or \$5,000, which have recently been levied on the land; that complainant had no knowledge of the same when he purchased. There are other *fi. fas.* levied on some \$4,000 or \$5,000, levied on said land; Baldwin has interposed his claim. It is further alleged that the land is subject to these *fi. fas.*, and that Ketchens tends to transfer complainant's notes, so that he will have to pay them but lose the land also; that Ketchens is anxious and desirous of paying his notes when due, to remain in the hands of defendant, so that when subjected to the payment of said *fi. fas.*, and he has to pay them off, such payment shall be pro tanto payment of said notes.

Ketchens vs. Howard.

Prayer for an injunction to restrain defendant from transferring complainant's notes, &c.

The defendant, Ketchens, filed his answer, admitting the bill in substance as above stated, except that he denied that complainant knew nothing of the incumbrances referred to; that he knew at the time of the trade, that the land was in litigation; he denied agreeing to get a warranty deed from Baldwin; that complainant had seen Baldwin before the trade; heard what he had to say about it, and knew he would not execute such a deed; that complainant had agreed to take defendant's warranty deed at the time of the trade, remarking, as he did, that he could not be hurt, as he considered the land worth all of \$20,000.

Upon the coming in of the answer, counsel for defendant moved to dissolve the injunction, on the ground that the equity in the bill had been sworn off by the answer.

The Court refused the motion, and counsel for defendant excepted.

_____, for plaintiff in error.

_____, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

After carefully considering the testimony in this case, our conclusion is to affirm the judgment of the Court below refusing to dissolve the injunction to this extent, namely, that Ketchens be permitted to trade, or otherwise dispose of the notes given to him by Howard for the land after the same fell due, and as each note becomes due, so that the holder or transferee trading for them after maturity, be chargeable with all the equities existing between the original parties.

One of the main equities set up in the Bill, to-wit, that the complainant was ignorant of the judgment lien on two lots, and that this fact was not known to him when he traded for the land and gave his notes, is only denied by the defendant to be true upon his information and belief.

ROBINSON *vs.* THOMPSON & CO.

ion creditor can not be enjoined from the sale of his debtor's prop-
erty on the ground that there are claims to it which will cause it to go off
at a low price.

city, in Muscogee Superior Court. Decision on de-
fendant's motion Judge WORRILL, at November Term, 1859.

as a bill filed by Alexander J. Robinson, adminis-
trator of the estate of Seymour R. Bonner, deceased, against D. B.
Thompson & Co.; and the object of the bill was to enjoin
defendants from selling certain real estate in the city of
Macon, under an execution in favor of defendants, found-
ed on a Mechanic's Lien as provided by Act of the Gen-
eral Assembly, giving Mechanics and others a prior lien on
certain cases. The bill alleged that Bonner's
estate was insolvent; that complainant had filed a bill
to compel defendants to marshal assets, &c., but being advised,
that defendants' claim and lien were paramount
to his, and could at all events be satisfied out of the
property on which their lien attached, they were not made
part of said Bill.

Bill further states that defendants had levied their
execution on said property, and claims thereto had been in-
terposed and that if said property, under the claims and
execution hanging over it, were exposed to sale,
it would be sold at a great sacrifice, and the creditors and
Bonner injured and seriously damaged. The bill
prays that defendants be restrained and enjoined
from selling said property under their execution, until the
execution hanging over the title may be cleared away, and the
rights of all parties thereto adjudicated and de-
termined.

All defendants demurred, and also filed their ans-
wers.

Court, after argument, sustained the demurrer, dis-
joined the answers, and dismissed the bill. To which de-
cision all parties excepted.

RUSSELL, for plaintiff in error.

contra.

 Rodgers vs. Rushin.

By the Court.—STEPHENS, J., delivering the opinion.

The case made by this Bill is, that the defendants in it, are pursuing their right of proceeding as execution creditors to sell the property of their debtor, but that certain claims to the property have been interposed, casting a cloud upon the title, and rendering it probable that the property will bring less than its value, to the injury of other creditors of the same debtor, the debtor being insolvent. If the Bill means that the claims have been legally interposed under the claim law, then they must be adjudicated or abandoned before there can be a sale, and the cloud will be removed. In that view, there is no need for the bill. If the Bill means that the claims have not been legally interposed, then the proposition is to restrain the sale till the title shall be cleared from the cloud formed by people's talk against it. Such clouds are very flimsy, and are also of very uncertain and uncontrollable duration. On this view, there is great injustice in the Bill. On either view, we are clear that the Judge was right in sustaining the demurrer and dissolving the injunction.

Judgment affirmed.

RODGERS vs. RUSHIN.

Where an executor dies pending a suit in equity against him, in which the complainants are attempting to fix a personal liability upon him on account of an alleged *devastavit* of the estate of his testator, it is proper that his representative should be made a party to the proceeding.

In Equity, in *Macon Superior Court*. Decision on motion to make parties, by Judge LAMAR, March Term, 1860.

Joel F. Rushin, *et al*, as legatees under the Will of John Rushin, deceased, filed their bill in Equity for discovery, account, distribution, &c., against John C. Rodgers, executor of John Rushin, deceased, and Cicero H. Young and John M. Felton, executor of Shadrach R. Felton, deceased, who, in his life time, was also executor of John Rushin, deceased.

It was charged in the bill that John C. Rodgers, Shadrach R. Felton, and William Rushin, who were appointed executors of the Will of said John Rushin, deceased, all qualified, but that Rodgers and Felton took charge of the property, and, therefore, no decree was prayed for against William Rushin. The object of the bill was to recover what was due complainants as legatees under said Will.

Pending this suit, John C. Rodgers, one of the defendants, died, and his widow, Mary C. Rodgers, was appointed administratrix on his estate.

Scire facias was served on her to make her a party defendant in said bill, to which she objected.

The Court passed an order requiring her, as administratrix, to be made a party defendant, and to answer the bill within four months thereafter, to which she excepted.

WM. Y. HANSELL, for plaintiff in error.

BLANFORD & CRAWFORD, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Ought Mary C. Rodgers, as administratrix of John C. Rodgers, deceased, to have been made a party defendant to the case? We think so.

The Bill was filed by the legatees of John Rushin, deceased, against John C. Rodgers, executor of John Rushin, deceased, and Cicero H. Young and John M. Felton, executors of Shadrach R. Felton, deceased, who, in his life time, was also executor of John Rushin, deceased, for discovery, account, and distribution.

It is charged in the bill, that John C. Rodgers, Shadrach R. Felton, and William Rushin, were all appointed executors of John Rushin, deceased; and that all qualified, but that Rodgers and Felton took charge of the property; and,

Lesterjelle vs. Mayor and Council of the City of Columbus.

therefore, no decree is prayed for against William Rushin. John C. Rogers, one of the executors, having died, shall his administratrix be made a defendant? The Bill charges John C. Rodgers with a *devastavit*, that he had sold the whole of the property belonging to the estate of his testator, and converted it into money. It is altogether proper, therefore, that his representative should be made a party to a proceeding which seeks to fix a personal liability upon his estate.

LESTERJELLE vs. MAYOR & COUNCIL OF THE CITY OF COLUMBUS.

A party summoned to answer for an offence committed against one ordinance, cannot be proceeded against and punished by another and a different ordinance.

Certiorari, in Muscogee Superior Court. Decision by Judge Worrill, at May Term, 1860.

The plaintiff in error was summoned to appear before the City Council of Columbus for a violation of the city ordinances under the forty-fourth section. The plaintiff in error was fined the sum of ten dollars. The said Mayor fined said plaintiff in error under an Act of the Legislature passed in 1858, after the enactment of the said forty-fourth section by said Mayor and Council; and, therefore, said plaintiff in error filed his petition for *certiorari*, which was returned and argued before Judge Worrill at the last May Term, 1860, of Muscogee Superior Court.

The Court overruled said petition for *certiorari*, and dismissed the same. Whereupon, said Henry L. Lesterjelle excepted, and now assigns the same for error.

Staley vs. Matheny.

RUSSELL, for plaintiff in error.

BODY, *contra*.

the Court.—LUMPKIN, J., delivering the opinion.

Case is covered and controlled by the decision made in the case of the Mayor and Council of Co-against John D. Arnold. The ground being, that a summoned to answer for an offence committed against ordinance, cannot be proceeded against and punished by and a different ordinance. And upon the further that the offence, itself, was not charged with sufficiency.

STALEY vs. MATHENY.

a promissory note, agreed with the maker that if he would take note, held by a third person, it should be received as payment. This, the maker did. The maker's note was transferred by the t fell due. *Held*, That the maker was entitled to a credit by sent for the note of payee, which he had taken up.

at, in Lee Superior Court. Decision by Judge t March Term, 1860.

sued Staley on a note dated June 6th, 1855, for ble to John C. West, or bearer, and due on the January, 1856. Defendant pleaded that he had said note in this way: that John C. West, whilst l note, agreed if defendant would take up two said West owed one Haywood for the respective

 Ball vs. Duncan.

sums of \$51.18 and \$40.08, it should be regarded as payment *pro tanto* of the note sued on; that defendant took up the Haywood notes as per agreement, and that the plaintiff got the note sued on after it was due.

On the trial of the case plaintiff's counsel moved the Court to strike out defendant's said plea, which motion was granted by the Court, and defendant's counsel excepted.

F. H. WEST, for plaintiff in error.

GREENLEE BUTLER, for defendant in error.

By the Court.—LUMPKIN, J., delivering the opinion.

We can imagine no possible reason why the plea of payment in this case was not good. None has been assigned.

BALL vs. DUNCAN.

There is no statute authorizing the Clerk to claim a fee of one dollar in advance for entering a case upon the motion docket. And it was not competent for the Judges in convention to enact such a rule.

Motion, in Randolph Superior Court. Decided by Judge PERKINS, at May Term, 1860.

James E. Duncan, by his counsel, proposed to enter a motion to establish a lost *fi. fa.* on the motion docket, at the Court below. The clerk objected to entering the same, until he was paid the sum of one dollar, claiming that he was entitled to that sum under the rule of the Court. The Court, on motion, compelled the clerk to enter the case, directing

that he was not entitled to anything for entering that or any other case on the motion docket, and could not exact the payment of one dollar from the party applying to have the case docketed.

The Clerk (M. Ball) excepted to this ruling, and now assigns it as error.

Hood, representing G. S. & C. ROBINSON, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

If the Clerk is not entitled to the fee claimed by statute, and we know of none, it is clear that it was not competent for the Judges in convention, to enact such a fee. Be this, however, as it may, the fee, if due, is, in the language of the law, "Court cost;" none of which can be claimed till the end of the case. This fee is exacted in advance of the service to be rendered.

ROBERT vs. BOYNTON.

A party on the record who, at the trial, has no interest in the event of the suit, may be examined as a witness.

Complaint, in Dougherty Superior Court. Tried before Judge ALLEN, at June Term, 1859.

The decision of the Court contains a statement of the fact and question in this case.

Bennett vs. Odom.

By the Court.—LUMPKIN, J., delivering the opinion.

The only question in this case is, whether a party to the record, who has no interest at the trial, in the event of the suit, can be examined? It was solemnly decided that he could be in the case of the Central Railroad and Banking Company against Hines, Perkins & Co. 19 Ga. Rep. 203. And the same point has since been re-affirmed after the most thorough examination. The point, therefore, is no longer an open question in this Court.

BENNETT vs. ODOM.

1. Where the question is one of fact only, turning upon the credit of the witnesses, and there is ample testimony to support the verdict, it will not be disturbed—especially where material evidence, in the power of the defendant, has not been produced.
2. If a defendant pleads a tender, and the Jury find a larger sum due, the amount of money paid into the Clerk's office by the defendant, and which he admitted to be due, may be ordered to be credited upon the judgment.

Certiorari, from Clay county. Decided by Judge KIMBRO, September Term, 1859:

Zadock Odom commenced his action against James W. Bennett, on account, for \$12.00 in a Justice's Court. The defendant pleaded the general issue.

On the trial, plaintiff therein testified that he hired Bennett some slaves in 1858, and that the account stated was the correct account of the amount of time that such slaves were hired for defendant; and that defendant never paid said account in full, but there is a balance of \$12.00 now due him thereon. The account of hire was kept in the following manner:

at to defendant's house twice for a settlement, but does not sider that they ever had a final settlement; never said was satisfied with the settlement; said all the time there a mistake of twelve days by defendant.

Martin Bennett testified in behalf of defendant; that he present and heard plaintiff and defendant talk over their element, and thinks it was understood that defendant owed intiff six dollars; was present all the time and did not r plaintiff express any dissatisfaction as he considered it. George Williams also testified, that he was present and de the calculation, and it was then considered the defend- owed plaintiff six dollars; did not hear plaintiff say he satisfied; defendant would have paid plaintiff the six lars at the time, but could not make the change; heard intiff say, when he left, there was some mistake.

The Jury having found for the plaintiff the amount claimed him, the defendant carried the case to the Superior Court *certiorari*, when the Court ordered the same to be dis- seced and the six dollars paid by defendant, in Court on ng his plea credited on plaintiff's judgment. Defendant's usel excepted thereto.

CULLENS & TURNIPSEED, for plaintiff in error.

WELLS & McLENDON, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

The amount of hire owing by Bennett to Odom, was pure a question of fact, depending on the testimony of the intiff on one side, and two witnesses on the other. The ry have seen fit to give credit to the plaintiff. This they d a right to do, and the Circuit Judge has refused to dis- b their verdict. We do not feel at liberty to control his nion in this case.

There was one great oversight on the part of Bennett. om swears that he noted down in an almanac, the time : negroes worked. This memorandum was used by the ties in both settlements. It was left with Bennett. As y rate, he could have had it on the trial. Why was it not re to compare with and correct, if erroneous, the account ad on by Odom?

 Moiese vs. Knapp.

We see nothing wrong in the direction given by the Judge in the case.

MOIESE vs. KNAPP.

1. M. sues out a writ against K., returnable to May Term, 1859, of the Court. Service is duly acknowledged by the defendant, and process waived in April. The case is not docketed until November Term thereafter, when the parties appeal by consent. *Held*, That the defendant is not entitled to have the case dismissed upon the appeal, because it was not docketed at the appearance Term in May, 1859.
2. Blank acceptances are binding upon the acceptor, there being no complaint that the drafts were not filled out according to the agreement of the parties.

Assumpsit, in Muscogee Superior Court. Tried before Judge WORRILL, at May Term, 1860.

This was an action of assumpsit by Knapp against Moiese, on acceptances by Moiese of certain drafts drawn on him by Knapp, amounting to about \$1,172.21. The writ was returnable May Term, 1859, of Muscogee Superior Court, but upon being filled up, without being filed or entered in the Clerk's office, service was acknowledged thereon by defendant, with the usual waiver of process and copy docket and process. This acknowledgment bears date April 10, 1859. At the succeeding November Term of the Court, by consent of parties, the case was, by order of the Court, transferred to the appeal. At May Term, 1860, the case being called in its order on the appeal docket, the Court moved to dismiss it, on the ground that the writ had not been filed in office or entered upon the record, or upon the docket of the Court. The presiding Judge held that as much as the cause had at the preceding term, which was

trial term at common law, been, by order of the Court and by consent of parties, transferred to the appeal, it was now too late for defendant to make the objection of want of file, &c., and refused the motion to dismiss, and defendant excepted.

Defendant then filed his plea, verified by his oath, that at the time his name was written across the face of the papers, and being the acceptances sued on, "there was no drawer to the same, nor was the name of the drawer put there in his presence, or by his order; and that said bills were drawn to his order and not endorsed."

To this plea plaintiff demurred. The Court below sustained the demurrer, and defendant excepted.

JONES & JONES, for plaintiff in error.

JOHNSON & SLOAN, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

Service was acknowledged in this case, and process waived in April, 1869. The case was not docketed at the ensuing May Term; nor until the ensuing November Term, thereafter, when the case was carried to the appeal by consent. At the first term of the appeal, a motion was made to dismiss the case, because it had not been docketed at the appearance term.

There are cases where the Courts from considerations of public policy, will allow advantages of this sort to be taken of a party. But whenever the case is sued out in time, and such is the undisputed fact here, we do not see that any great mischief can result from a failure to docket it, so far as the defendant himself is concerned. We express no opinion where the rights of third persons may be involved.

As to the blank acceptances, we see nothing in that. Such things are not unusual. There was no abuse of confidence in this case. The instruments were filled out as they were intended to be. Even if they had not been, and third persons had innocently got hold of them in the due course of business, the acceptances would have been binding.

THE WATER LOT COMPANY vs. JONES.

1. A verdict will not be set aside as being against the evidence, when the evidence is decidedly conflicting.
2. A hypothetical charge, which has an injurious tendency, is error.

Case, in Muscogee Superior Court. Tried before Judge WORRILL, at November Term, 1858.

Seaborn Sones sued the Water Lot Company for damages, alleging, that defendant had built a dam on the Chattahoochee River, which backed the water upon plaintiff's mill and lands situated higher up said river, by reason whereof, the mill of plaintiff was obstructed and his land injured.

On the trial of the case, the Court charged the Jury: "That a permission from the plaintiff to the defendant to erect the dam complained of need not be established by direct proof, but if the Jury should believe, from all the facts in evidence, that the plaintiff assented, acquiesced in, or permitted the same to be erected, then the plaintiff cannot recover."

The verdict was for the defendant, and plaintiff moved for a new trial on the grounds:

- 1st. That the verdict was against Law and the evidence.
- 2d. Because the charge of the Court above stated was erroneous.

The Court granted the motion and awarded a new trial, and counsel for the Water Lot Company now assign that judgment as error, and insist that the verdict was in accordance with the evidence, and that the charge of the Court was correct in principle, and supported by the proof.

It is only necessary to give that portion of the evidence which it is claimed supports the charge of the Court, as the decision of the Supreme Court relates only to the propriety of that charge, and because the evidence is conflicting on the other material points in the case.

1st. The first piece of evidence relied on to support the charge of the Court is the following agreement:

"I do hereby agree that Dr. Ingersoll may raise the water as high as may be necessary, provided he does not flow the water back so as to interfere with my works or the use of

The Water Lot Company vs. Jones.

on, and I do hereby renew to him the privilege heretofore
en, of landing his flat and lumber on my land on the riv-
above Columbus—this 22d February, 1839.

[Signed] "SEABORN JONES."

[In connection with this agreement it appears that Inger-
l once had a dam on the river. The record does not dis-
se the exact place at which this dam was built, but it ap-
ars that the dam did not extend across the channel of the
er, but only to the channel. The dam complained of by
nes was built, it seems, in 1845, by Jonathan Bridges for
hn H. Howard and Josephus Echols; and one witness
ys: That Ingersoll assisted in building it, and moved his
ll to the west end of it. Another witness says: That
ridges once sent him to work on the dam, and instructed
m to take some of the plank off the top of the dam to
event it from backing the water upon Jones' mill, which
e witness attempted to do, but Smith Jeter and Major
oward stopped him.

2d. The evidence shows that at the time Jonathan Bridg-
s built the dam complained of, he was the lessee of Jones'
mill. The record does not show for what length of time his
ase to Jones' mill continued.

3d. The record shows that the suit was instituted on the
3d day of October, 1849, to recover for damage alleged to
ave been done during the years intervening between the
ear 1844 and the time when the writ was filed.

JOHNSON & SLOAN, for plaintiff in error.

SEABORN JONES, for defendant in error.

By the Court.—STEPHENS, J., delivering the opinion.

1. As to the point much discussed in this case, whether
or not the plaintiff's land was overflowed from the dam, the
evidence was too conflicting to authorize us to say that the
verdict ought to have been set aside, as being against the
evidence.

2. But we are satisfied that there was no evidence to jus-
tify the charge touching Col. Jones' permission to build the
dam, and that the Judge was right in granting a new trial

 Clayton vs. Bussey & Ferrer.

on that ground. The permission to Dr. Ingersoll was not a permission to anybody else, and the permission to him was only to raise a dam which already existed on the 22d February, 1889, while this dam was *built* six years afterwards. Besides, his dam was a small affair, compared with this one, his reaching only to the channel and this across it. How a permission to one man to *raise* an existing little side dam can be construed into a permission to somebody else to *build* a dam across the stream six years afterwards, I cannot perceive. Nor can Col. Jones' *acquiescence* in the building of the dam be inferred from the fact, that it was built by the lessee of his mill. There are some cases where a lessor may be presumed to acquiesce in what is done by the lessee on the premises leased, but surely the relation of lessee and lessor cannot raise a presumption in any case, that either party acquiesces in acts done by the other off the premises. Nor can any acquiescence be inferred from the delay in bringing the suit. To say that delay in redressing an injury imports a consent to it, is to make the injury itself a justification of all its subsequent repetitions.

Judgment affirmed.

CLAYTON vs. BUSSEY AND FERRER.

Equity will grant relief from an endorsement which, through mistake as to the legal effect of the words used, binds the endorser to pay the note, when the true contract and intention was to write only such an endorsement as would convey the title without rendering the endorser liable.

In Equity, from Stewart County. Decided by Judge PERKINS, October Term, 1859.

The plaintiff in error having been sued at Common Law

Clayton vs. Bussey & Ferrer.

ser of a promissory note, filed this Bill to enjoin, and to reform the contract of endorsement as written note, so as to make it correspond with the agreement of the parties, which the complainant alleged was, that it not to be held liable on the endorsement.

ill presents these facts : On the 12th day of March, 1857, James P. Clayton made and delivered his promissory note for \$825, payable by the 1st day of January, 1857, to John B. Clayton or bearer. On the 10th day of January, 1857, after the note fell due, and being still in the hands of John B. Clayton, the payee, negotiated a transfer of the note for value to Zadock Bussey. But in order to make it legal thereto to the transferee, the latter insisted that as necessary, according to Law, that the payee should endorse it. Clayton, the payee, supposing this to be a legal way to be held liable on his endorsement, provided he was so, agreed to and stated the agreement in presence of the witnesses. The transfer was written across the note as

follows: "I hereby transfer the within note to Z. Bussey, this 10th Jan-

uary, 1857."
J. B. CLAYTON.

Subsequently, Bussey having transferred said note by delivery, to Camillus Ferrer, the latter brought suit in equity against Clayton on said endorsement, and was suspended by the injunction asked for in this

Bill. Whereupon, the Court ordered the Bill to be dismissed with costs, and the cause referred to the Court of Equity.

Decision counsel for complainant excepted.

VERMILL, for plaintiff in error.

W. H. & REDDING, contra.

Court.—STEPHENS, J., delivering the opinion.

It is held that a person who takes this note after it was due, holds it on an equitable defense springing out of the note.

Gaulden vs. Shehee.

or endorsement as could be made against it in the hands of his assignor. We have no doubt that the defense set up by this Bill is good against that assignor, Bussey. The substance of the Bill is, that the endorser mistook the legal effect of the form of endorsement which he used. He states that the contract between him and Bussey was, that there should be such an endorsement as would only transfer the title, and not bind the endorser, and that in endeavoring to carry out that contract, he mistook the legal effect of the words he used. This Court has frequently held that mistakes as to the legal effect of an instrument are relievable in equity. The doctrine is fully discussed in Lucas' case, not yet in print, but decided at the Atlanta March Term, 1860.

Judgment reversed.

GAULDEN vs. SHEHEE.

The rule of damages for a false representation is, that there must be a deduction from the agreed price, in proportion to the article's departure from the representation made of it.

Assumpsit, in Decatur Superior Court. Tried before Judge ALLEN, at May Term, 1859.

This was an action of Assumpsit brought by Shehee against Gaulden on a promissory note for \$2,500—said note being part of the agreed price or purchase money of a settlement of land lying on the Chattahoochee River, sold by Shehee to Gaulden. The defense was, that in the negotiation and treaty for the purchase of said land, the plaintiff misrepresented the quality and quantity of the bottom land, which at the time of the purchase was overflowed, so that defendant could not survey or examine it.

This case was before this Court once before, and a new trial awarded therein.

Upon the new trial ordered by the Supreme Court, the case being called, the defendant moved for a continuance. The Court refused to consider the motion unless the defendant would state that the application for continuance was for Providential cause—the case having been already twice continued by the defendant on the appeal. To which ruling counsel for defendant excepted.

Plaintiff read in evidence the note sued on and closed.

Defendant read in evidence the depositions of several witnesses, and examined, in open Court, others as to the representations made by plaintiff at the time of the trade of the quality and quantity of the bottom land, and as to other facts which he conceived material to his defense; but as no point is made upon this testimony, it is unnecessary to set it out more fully.

The plaintiff, in reply, proposed to prove by two witnesses Crawford and O'Neal, that the land was worth as much at the time as the defendant agreed to give for it. Defendant's counsel objected to this proof as irrelevant and illegal. The Court overruled the objection and allowed the witnesses to answer; and to this ruling counsel for defendant excepted.

The testimony being closed, the Court, among other things, charged the Jury, that if the land at the time of the purchase was worth as much as the defendant agreed to give for it, then he was not entitled to any deduction from the note, although they might believe that plaintiff made the false representations charged and proved—to which charge counsel for the defendant excepted.

The Jury found for the plaintiff the full amount of the note, with interest and cost. Whereupon, counsel for defendant moved for a new trial on the grounds of error in the rulings and charges above stated and excepted, and upon the further grounds:

1st. That the verdict was contrary to Law and evidence, and against the weight of evidence.

2d. That the verdict was contrary to the charge of the Court in this: That if the Jury believed from the evidence that the note sued on was given in part payment for a plantation purchased by defendant from plaintiff, which consisted

Gaulden vs. Shehee.

or endorsement as could be made against it in the hands of his assignor. We have no doubt that the defense set up by this Bill is good against that assignor, Bussey. The substance of the Bill is, that the endorser mistook the effect of the form of endorsement which he used. Had that been the case, that the contract between him and Bussey was, that it should be such an endorsement as would only transfer title, and not bind the endorser, and that in endeavoring to carry out that contract, he mistook the legal effect of the words he used. This Court has frequently held that it takes as to the legal effect of an instrument are relied on in equity. The doctrine is fully discussed in *Lucas*, not yet in print, but decided at the Atlanta March Term, 1860.

Judgment reversed.

GAULDEN vs. SHEHEE.

The rule of damages for a false representation is, that there must be a deduction from the agreed price, in proportion to the article's departure from the representation made of it.

Assumpsit, in Decatur Superior Court. Tried before Judge ALLEN, at May Term, 1859.

This was an action of Assumpsit brought by Shehee against Gaulden on a promissory note for \$2,500—said note being part of the agreed price or purchase money of a settlement of land lying on the Chattahoochee River, sold by Shehee to Gaulden. The defense was, that in the negotiation and treaty for the purchase of said land, the plaintiff misrepresented the quality and quantity of the bottom land which at the time of the purchase was overflowed, so that the defendant could not survey or examine it.

Gaulden vs. Shehee.

Gaulden vs. Shehee.

be made in this case was before this Court once before, and a new doubt there awarded therein.

that upon the new trial ordered by the Supreme Court, the the entry being called, the defendant moved for a continuance. The Court refused to consider the motion unless the defendant would state that the application for continuance was for a substantial cause—the case having been already twice considered by the defendant on the appeal. To which ruling the counsel for defendant excepted.

Plaintiff read in evidence the note sued on and closed. Defendant read in evidence the depositions of several witnesses, and examined, in open Court, others as to the presentations made by plaintiff at the time of the trade the quality and quantity of the bottom land, and as to the facts which he conceived material to his defense; but no point is made upon this testimony, it is unnecessary to set it out more fully.

The plaintiff, in reply, proposed to prove by two witnesses Crawford and O'Neal, that the land was worth as much at the time as the defendant agreed to give for it. Defendant's counsel objected to this proof as irrelevant and illegal. The Court overruled the objection and allowed the witnesses to answer; and to this ruling counsel for defendant excepted.

The testimony being closed, the Court, among other things, charged the Jury, that if the land at the time of the purchase was worth as much as the defendant agreed to give for it, then he was not entitled to any deduction from the note, although they might believe that plaintiff made the false representations charged and proved—to which charge counsel for the defendant excepted.

The Jury found for the plaintiff the full amount of the note, with interest and cost. Whereupon, counsel for defendant moved for a new trial on the grounds of error in the rulings and charges above stated and excepted, and upon the further grounds:

1st. That the verdict was contrary to Law and evidence, and against the weight of evidence.

2d. That the verdict was contrary to the charge of the Court in this: That if the Jury believed from the evidence that the note sued on was given in part payment for a plantation purchased by defendant from plaintiff, which consisted

Gaulden vs. Shehee.

or endorsement as could be made against it in the hands of his assignor. We have no doubt that the defense set up by this Bill is good against that assignor, Bussey. The substance of the Bill is, that the endorser mistook the legal effect of the form of endorsement which he used. He states that the *contract* between him and Bussey was, that there should be such an endorsement as would only transfer the title, and not bind the endorser, and that in endeavoring to carry out that contract, he mistook the legal effect of the words he used. This Court has frequently held that mistakes as to the legal effect of an instrument are relievable in equity. The doctrine is fully discussed in Lucas' case, not yet in print, but decided at the Atlanta March Term, 1860.

Judgment reversed.

GAULDEN vs. SHEHEE.

The rule of damages for a false representation is, that there must be a deduction from the agreed price, in proportion to the article's departure from the representation made of it.

Assumpsit, in Decatur Superior Court. Tried before Judge ALLEN, at May Term, 1859.

This was an action of Assumpsit brought by Shehee against Gaulden on a promissory note for \$2,500—said note being part of the agreed price or purchase money of a settlement of land lying on the Chattahoochee River, sold by Shehee to Gaulden. The defense was, that in the negotiation and treaty for the purchase of said land, the plaintiff misrepresented the quality and quantity of the bottom land, which at the time of the purchase was overflowed, so that defendant could not survey or examine it.

This case was before this Court once before, and a new trial awarded therein.

Upon the new trial ordered by the Supreme Court, the case being called, the defendant moved for a continuance. The Court refused to consider the motion unless the defendant would state that the application for continuance was for Providential cause—the case having been already twice continued by the defendant on the appeal. To which ruling counsel for defendant excepted.

Plaintiff read in evidence the note sued on and closed.

Defendant read in evidence the depositions of several witnesses, and examined, in open Court, others as to the representations made by plaintiff at the time of the trade of the quality and quantity of the bottom land, and as to other facts which he conceived material to his defense; but as no point is made upon this testimony, it is unnecessary to set it out more fully.

The plaintiff, in reply, proposed to prove by two witnesses Crawford and O'Neal, that the land was worth as much at the time as the defendant agreed to give for it. Defendant's counsel objected to this proof as irrelevant and illegal. The Court overruled the objection and allowed the witnesses to answer; and to this ruling counsel for defendant excepted.

The testimony being closed, the Court, among other things, charged the Jury, that if the land at the time of the purchase was worth as much as the defendant agreed to give for it, then he was not entitled to any deduction from the note, although they might believe that plaintiff made the false representations charged and proved—to which charge counsel for the defendant excepted.

The Jury found for the plaintiff the full amount of the note, with interest and cost. Whereupon, counsel for defendant moved for a new trial on the grounds of error in the rulings and charges above stated and excepted, and upon the further grounds:

1st. That the verdict was contrary to Law and evidence, and against the weight of evidence.

2d. That the verdict was contrary to the charge of the Court in this: That if the Jury believed from the evidence that the note sued on was given in part payment for a plantation purchased by defendant from plaintiff, which consisted

Gaulden vs. Shehee.

or endorsement as could be made against it in the hands of his assignor. We have no doubt that the defense set up by this Bill is good against that assignor, Bussey. The substance of the Bill is, that the endorser mistook the legal effect of the form of endorsement which he used. He states that the *contract* between him and Bussey was, that there should be such an endorsement as would only transfer the title, and not bind the endorser, and that in endeavoring to carry out that contract, he mistook the legal effect of the words he used. This Court has frequently held that mistakes as to the legal effect of an instrument are relievable in equity. The doctrine is fully discussed in *Lucas' case*, not yet in print, but decided at the Atlanta March Term, 1860.

Judgment reversed.

GAULDEN vs. SHEHEE.

The rule of damages for a false representation is, that there must be a deduction from the agreed price, in proportion to the article's departure from the representation made of it.

Assumpsit, in Decatur Superior Court. Tried before Judge ALLEN, at May Term, 1859.

This was an action of Assumpsit brought by Shehee against Gaulden on a promissory note for \$2,500—said note being part of the agreed price or purchase money of a settlement of land lying on the Chattahoochee River, sold by Shehee to Gaulden. The defense was, that in the negotiation and treaty for the purchase of said land, the plaintiff misrepresented the quality and quantity of the bottom land, which at the time of the purchase was overflowed, so that defendant could not survey or examine it.

case was before this Court once before, and a new
arded therein.

the new trial ordered by the Supreme Court, the
ing called, the defendant moved for a continuance.
rt refused to consider the motion unless the defend-
ld state that the application for continuance was for
ntial cause—the case having been already twice con-
y the defendant on the appeal. To which ruling
for defendant excepted.

iff read in evidence the note sued on and closed.
dant read in evidence the depositions of several
, and examined, in open Court, others as to the
tations made by plaintiff at the time of the trade
uality and quantity of the bottom land, and as to
ts which he conceived material to his defense; but
int is made upon this testimony, it is unnecessary
out more fully.

aintiff, in reply, proposed to prove by two witnesses
and O'Neal, that the land was worth as much
e as the defendant agreed to give for it. Defend-
isel objected to this proof as irrelevant and illegal.
t overruled the objection and allowed the witnesses
; and to this ruling counsel for defendant ex-

stimony being closed, the Court, among other
arged the Jury, that if the land at the time of the
was worth as much as the defendant agreed to give
n he was not entitled to any deduction from the
ough they might believe that plaintiff made the
esentations charged and proved—to which charge
the defendant excepted.

y found for the plaintiff the full amount of the
interest and cost. Whereupon, counsel for defend-
for a new trial on the grounds of error in the rulings
s above stated and excepted, and upon the further

t the verdict was contrary to Law and evidence,
; the weight of evidence.

at the verdict was contrary to the charge of the
is: That if the Jury believed from the evidence
e sued on was given in part payment for a plan-
ased by defendant from plaintiff, which consisted

Gaulden vs. Shehee.

in part of river bottom land, which was the principal inducement to the purchase, and that at the time of said purchase the bottom land was covered with water, so that the defendant could not inspect or measure it, and plaintiff made representations as to its quality or quantity which were false, and upon which representations defendant relied, and there was in fact a less quantity of bottom land than was represented, or of inferior quality or of less value than represented then defendant was entitled to a deduction on the note.

The Court, after argument, refused the motion for a new trial, and counsel for defendant excepted.

G. R. HUNTER & J. E. BOWER, for plaintiff in error.

McINTYRE & YOUNG, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

The contract of parties, and not the opinion of witnesses, is the standard of value for the article sold and bought, taking the article to be of the quality and quantity, or more generally, of the description given to it by the vendor. The agreed price is the price for the article *as described*, and there must be a deduction from that price whenever two things occur: when the article was really below the description, and the description was given by the vendor without an honest belief in its truth. The deduction in price must be in *proportion* to the departure from the description. If the deficiency in the article detracts from its value one-half or one-tenth, one-half or one-tenth must be deducted from the *agreed price*. For the reasoning in support of this rule of damages, I refer to the case of *Hook vs. Dunn & Stovall*, decided at Savannah during the present riding. This rule disposes of both charge and evidence, and it is unnecessary to consider the other points presented by the record.

Judgment reversed.

MUSTIAN vs. JONES & BROOKS.

which alleges that a lot of land, of which the complainant was the owner, was sold through misapprehension by the Sheriff, the complainant offering to repair all the consequences of the mistake to the purchaser, and which alleges that the Sheriff, at the instance of the purchaser, to turn the complainant out of possession, is a good Bill, and ought to be granted for the equitable relief of injunction and cancellation.

quity, in Muscogee County. Decision by Judge L., at Chambers, 20th January, 1860.

L. Mustian filed his Bill in Muscogee Superior Court, alleging that, he being the owner, and in possession of number 93 in the city of Columbus, sold the same to Israel F. Brown for seventeen hundred and twenty-five dollars, taking Brown's note for the purchase money, and giving him a bond to make titles to the land when said money should be paid; that Brown entirely failed to pay the note or any part of it, the complainant brought suit on the same in said Superior Court, and at the term, 1859, recovered a judgment against said Brown for seventeen hundred and twenty-five dollars and one hundred and seventy-one dollars and six cents interest to the date of judgment, with cost of suit; that on the rendition of said judgment, Brown becoming insolvent, that he could not pay for the lot, proposed to sell the same in trade, which proposition complainant accepted, the contract was rescinded, and complainant's bond for return of the lot was given up to him, and the judgment satisfied as to all costs. Complainant rescinded the contract because he ascertained that Brown was insolvent; that shortly after the execution of the trade, in the month of October, 1859, complainant took possession of said lot of land, according to the terms of the trade, and in pursuance of, the terms upon which said trade was rescinded, and has held possession of the same ever since; that about the first of October, 1859, Francis S. Jones, then Sheriff of said county, levied the *fi. fa.* on the judgment aforesaid, on said lot as the property of Israel F. Brown, and advertised the same to be sold at public sale on the first Tuesday in November, 1859; that on the day of sale, complainant, by his attorney, enquired

Mustian *vs.* Jones & Brooks.

of John Ligon, who was then acting as Deputy Sheriff, (the principal Sheriff being confined at home by sickness) if the said lot so levied on and advertised as aforesaid would be sold, and was informed by the said Ligon that the property would not be sold in consequence of the illness of the said Brooks, the principal Sheriff; that the enquiry was made for the sole purpose of giving the Sheriff instructions not to sell said land under said fi. fa., because the contract between Brown and complainant had been rescinded, and the fi. fa. satisfied as aforesaid, and that complainant had possession of said land; that one G. J. Lloyd, who had been recently temporarily sworn as Deputy Sheriff, and of whose qualification as such Deputy Sheriff complainant at the time of sale was wholly ignorant, put up and exposed said lot to sale in the absence of said Brooks, and Ligon and complainant, and in the absence of the fi. fa., and without any evidence of the existence of the same except the newspaper advertisement of the sale; that complainant knowing that the fi. fa. was settled, and being informed as aforesaid that the lot would not be sold on that day, did not attend the sale, and did not file in the Clerk's office any deed to said Brown for the lot, and said lot was therefore sold and bid off by R. J. Moses, Esq., for the nominal price or sum of one hundred dollars, said Moses, as complainant is informed and believes, announcing at the time of sale and before any bid was made for the land, that he either had a mortgage on said land or represented a mortgage claim on the same, and being the only bidder, and making but one bid, bought said land for the price aforesaid of one hundred dollars, when the same was then worth two thousand dollars; that no mortgage was exhibited, and if any existed, complainant had no knowledge of the same whatever, and that the land sold for the nominal sum aforesaid in consequence of the representations of said Moses, that there was a mortgage lien or incumbrance on the land; that, as complainant is informed, the said R. J. Moses has transferred his bid aforesaid to Seaborn Jones, and that the said Sheriff, Brooks, has executed a Sheriff's deed, conveying to the said Jones all the interest of Brown in said land, which interest complainant avers was nothing, as said Brown never had any title to the land, and had never paid a dollar of the purchase money; that in the face of all the facts aforesaid, the said

Mustian vs. Jones & Brooks.

pressing the said Brooks to put him in possession land, which the Sheriff has notified complainant he and which he will do unless enjoined by a Court of

prayer of the Bill is, that the said Seaborn Jones & Brooks may answer the charges of the Bill, and pretended Sheriff's sale may be set aside, and the deed made by Brooks to Jones under the transfer of Moses may be delivered and cancelled; and relief.

complainant offers in his bill to refund the hundred paid by Moses for the premises, &c.

plaintiffs answered the Bill and moved that the injunction be dissolved, on the grounds, that the equity of the Bill was sworn off by the answer, and that there was no said Bill.

Court, after argument, ordered the injunction to be on the ground, that complainant had an adequate Common Law remedy.

the decision counsel for plaintiff excepted.

S WILLIAMS, JOHNSTON & SLOAN, for plaintiff in

JONES, *contra*.

Court.—STEPHENS, J., delivering the opinion.

the Court below dissolved the injunction upon the ground, that complainant had an adequate Common Law remedy. I do not think so. The case made by the Bill is, that the land was sold through a misapprehension, all the titles of which to the defendant the complainant claims; and further, that the sale conveyed no title to the defendant in *fi. fa.*, and so the defendant purchased only such title as would enable him to annoy the complainant, who is the true owner, without enabling him to recover over the land—just such a title as ought to be cancelled by cancellation and injunction, remedies which are available only in a Court of Equity.

the decision reversed.

Renew vs. Butler.

RENEW vs. BUTLER.

A. conveys land to B., his brother-in-law, in trust for the separate use of his wife and children. B. and his family move off, leaving A. to manage the property, who, instead of renting it out, cultivates it himself, accounting to the *cestui que trust* annually for the rent. The land is sold under a small *fi fa.* against B. for a sum less than one year's value, and bid off to A. to whom the title is made: *Held*, That occupying the fiduciary relation which he did, and having full knowledge of the title, he cannot hold the land, but will be compelled to re-convey to the *cestui que trust*, upon being refunded the purchase money paid at Sheriff's sale, and paid his commissions for the management of the property.

In Equity, from Sumter Superior Court. Tried before Judge ALLEN, April Adjourned Term, 1859.

James Butler, as trustee for his wife, Mary Butler, filed his Bill in Equity against Timothy Renew, for discovery and account.

He alleges, that in the year 1886, he and his wife being in possession of a certain parcel of land in said county, the defendant, Renew, the brother of said Mary Butler, executed to him in trust for his wife during her life, remainder to her children at her death, a deed of gift for the said parcel of land, and which was duly recorded; that although the deed was in form a gift, yet the said Renew received from complainant a full valuable consideration therefor.

It is further alleged, that the said complainant and wife being about to remove to Baker County, deposited said deed of gift with said Renew, and put him in possession of said land as their agent to take care of, rent out, &c., for them; that there were some thirty acres of the land then in a high state of cultivation; there were good improvements on the place, and the whole were worth \$500.

The Bill charges, that said Renew failed to account for the rents, issues and profits thereof, and denies title in complainant, and prays for a discovery and account concerning his actings and doings in the premises.

The answer of defendant admitted the facts stated in the Bill in relation to the deed of gift, and the moving of complainants to Baker County; also, that defendant had been requested to rent out the land for complainants, and that

done so and accounted to said Butler for said rent. He says that he was appointed as complainant's agent to enter the said land; admits the premises to have been some three or four hundred dollars.

He further stated, that in 1843, the premises were levied by virtue of a fi. fa. against James Butler, when he tried to get him, defendant, to claim the same as his property, which defendant refused to do—the same being the property of said James Butler, he having bought it with his own means; that afterwards the land was sold by the Sheriff at public sale and was bid off by William Mims, to whom the Sheriff executed a deed therefor, that he, defendant, afterwards, in the same year, bought the same from said Mims, receiving therefor herefor, under which he has claimed the land ever since as his own right; that said James Butler had notice of the same and made no objection, and ceased thereafter to claim the same rent. Defendant did say, on several occasions, that he had purchased the land with the view of letting Mrs. Butler, who was his sister, have it back, as an act of brotherly love and favor, and would have done so if application had been made in a reasonable time.

At the trial, the complainant made proof of the value of the land and improvements, which corresponded with the value stated in the Bill; also, that the cleared part of the land in 1843 some fifteen or twenty acres, was worth \$25 per acre.

Defendant here rested his case—the deed of gift having been previously put in evidence.

Defendant then read in evidence the deed from the complainant to William Mims, dated 4th day of April, 1843, duly acknowledged; also, the deed from Mims to defendant, recorded 31st day of October, 1843, recorded in 1854.

Defendant then introduced Green M. Wheeler, who testified that he levied on and sold said land to William Mims, as stated in the answer of defendant; that Mims bought the land at \$25, and not \$75, as erroneously stated in the Bill to Mims; that at the time he executed said deed Mims said, he, Mims, could make a speculation off the land but would not, as he had promised defendant, to let him have the place, or that he would buy it. Defendant was not then present; Mims also told

Renew vs. Butler.

witness at the sale, he had bid off the property for defendant, which was after the sale.

Defendant also introduced William Thomas, who testified: That complainant and wife came to defendant's house after their removal, and received the rent of the premises; that complainants never came or applied for the rent of said land after said Sheriff sale, that he knew of; complainants moved from Baker County out of the State in 1855-6 or '7, not certain when; that James Butler came regularly every year till Christmas, 1843, and received the rents, but did not come after that year; did not know of Renew giving any notice to Butler and wife of his claiming the property after the sale.

The Jury found for complainants the premises in dispute and \$200 mesne profits.

Thereupon, the defendant moved for a new trial on a number of grounds. The Court overruled the motion, and counsel for defendant excepted.

The only ground considered by this Court was the one, that the verdict was contrary to Law and evidence—the other grounds not being properly certified.

A. R. BROWN, WARREN & WARREN, for the plaintiff in error.

McCAY & HAWKINS, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

In 1836, Timothy Renew executed to James Butler, as trustee for his wife, Mary Butler, the sister of Renew, and her children, a deed to a tract of land in Sumter County.

Sometime thereafter, Butler and wife removed to Baker County, and Renew acted as agent in the management of the land. Instead of renting it out, he cultivated it himself, accounting to them annually for the rent. In 1843, the land was sold under a small *fi. fa.* against Butler—the date of the judgment is not shown—the probability is, that it was younger than the deed of trust—how much younger does not appear. One Mims bought in the land for Renew, took a Sheriff's deed, and gave a quit-claim deed to Renew.

Bill is filed by Butler and wife against Renew, offering the money paid by him, and praying for a decree of the land and an account for the rents.

The court rendered a decree in conformity with the prayer of the bill, deducting from the rents the purchase money, the commissions due Renew as trustee for his management of the property. A motion was made for a new trial, which was denied by the Court, and it is to reverse this decision that a writ of error is brought.

Renew insisted by Renew in his answer, that Butler and wife that the land was levied on, and that failing to take steps to prevent the sale, he, as purchaser, should be liable; especially after the lapse of time which has elapsed in this case.

It might be between a stranger and the complainants, and it is for the court to enquire. Mr. Renew does not occupy that position. The mere fact of his buying the land through Mims, and taking a deed from Mims is not such a repudiating trust as will entitle him to the benefit of the doctrine of the lapse of time. Besides, he bought with knowledge of the nature of the estate, and instead of claiming, as he says he did, that the property was liable to the debts of Butler, he knew that the contrary was true. In the deed which he himself executed, the land was conveyed to Butler to hold as the separate estate of his wife, and was not chargeable with Butler's debts.

By his own deed, thus passed the title, and occupying the same relation which he did to his sister and her children, it would be most inequitable to allow him to benefit from the lapse of time.

It is not to feel called upon, then, to reverse the judgment of the trial Judge, which is in accordance with justice and

BLACK vs. LEWIS et al.

Whatever errors may have been committed, a new trial will not be granted when a different verdict, if rendered, would not be allowed to stand.

Claim, from Dougherty County. Tried before Judge ALLEN, at December Term, 1859, Dougherty Superior Court.

A *fi. fa.* in favor of William A. Lewis against Abraham A. Danforth was levied on two negroes named Titus and Biddy. Danforth, as agent for Robert C. Black, trustee of Danforth's wife, claimed that the property belonged to Mrs. Danforth—the claim being made April 28th, 1858.

The case was tried on the appeal at the Term of the Court above mentioned, and the Jury rendered a verdict subjecting the property, and found ten per cent. damages against the claimant for putting in the claim.

The evidence introduced on the trial is as follows :

The plaintiff, after offering his *fi. fa.* with the levy thereon, proved, that the defendant in *fi. fa.*, Danforth, was in possession of the negroes both before and after the judgment of plaintiff was obtained and that said Danforth had been in possession from the time he came to Albany until the levy was made.

The claimant introduced and read in evidence a Bill of Sale from said Danforth to Henry H. Brown, dated August 28th, 1857, and conveying the negroes levied on to said Brown—the consideration stated being \$1,800. Claimant then read the testimony of John V. Price, whose statement was as follows : He has held various notes or drafts on A. A. Danforth, as acceptor of the drafts and owner of the notes. They were paid at various times by Danforth himself, and one draft for \$418 was paid by Brown & Carmichael, and he thinks another was paid by Henry H. Brown, but does not recollect the amount nor the time when paid.

The testimony of Thos. H. Brown, taken by commission, was then read by claimant. Brown stated : That he had before seen certain notes annexed to the interrogatories in the possession of Henry H. Brown ; he saw the note for \$1,005 about the 1st of November, 1856 ; does not recollect the exact time when he saw the note for \$1,256, but

it was in the latter part of 1856, or early in 1857. He stated, that the note for \$1,005 was given by A. Danforth for money advanced to him by H. H. Brown, and the note for \$1,256 was given to H. H. Brown for sold by John V. Price, made by Danforth, and payable to I. A. Scott, and which Price had shewed to Brown; the witness says, were the statements of H. H. Brown at the time he shewed the notes to witness. This witness testified, that he had seen another note for about \$1,300 Danforth, in the hands of H. H. Brown, but did not know the date of the note nor when it fell due; was present at the execution of either of the notes men-

The witness testifies, on cross-examination: That Danforth sold a house and lot in Albany to H. H. Brown, and sold it to F. K. Wright; Danforth received from F. K. Wright a house and lot in Americus, and a note on said lot for \$2,500.

The witness then read two notes made by Danforth, one for \$2,500, dated Oct. 25th, 1856, and payable on the 25th of October thereafter to H. H. Brown or order, and the other for \$1,256, dated March 26th, 1856, and payable to said witness the day after its date.

The execution of the notes by Danforth was admitted by the witness, and it was also admitted that H. H. Brown was at the time a firm of Brown & Carmichael, and that Danforth's signature was the signature of said Brown.

The witness then offered John M. Kendall, who proved, that he built the house in Albany now occupied by F. K. Wright. Plaintiff then proved by Wright that he paid for the property \$2,500 and a house in Americus estimated in value at \$2,000; that he took a deed from H. H. Brown for the property, and that Danforth resided on the premises until the day of the sale, and continued to reside there until he moved in.

The verdict having been for the plaintiff, as stated, the Court moved for a new trial on the following grounds:

1. Because the verdict is contrary to the evidence.

2. Because the verdict is contrary to the Law.

3. Because the Court erred in refusing to charge, as requested, that the antecedent debt of Danforth to Brown was satisfied by the continued possession of Danforth.

Black vs. Lewis et al.

4th. Because the Court omitted to charge, that said antecedent debt was a circumstance the Jury could take into consideration to explain the subsequent possession, although not specially requested so to do.

The Court refused to grant a new trial, and counsel for the claimant now assign that judgment of the Court as error.

Immediately after the trial of the above stated case in the Court below, several cases were reached on the Docket where *fi. fas.* in favor of different plaintiffs against the same defendant had been levied on the same property involved in the trial, to-wit: the two negroes Titus and Biddy, and a claim interposed by the same claimant.

When these cases were called, claimant moved to continue them for the Term, on the ground, that the Jury in attendance on the Court had already passed on the issues involved.

The Court refused to continue, but postponed the cases until the week following, when a new Jury was to be empanelled.

When the cases were again called, a different Jury being in attendance, counsel for claimant moved to continue them, stating in his place as a ground therefor, that he believed he could, at the next Term of the Court, procure evidence to explain fully the subsequent possession of Danforth, so as to come up to the ruling of the Court on that subject.

The Court refused to continue the case, and claimant's counsel assign as error the postponement of the cases by the Court from the first to the second week, and the then refusal of the Court to allow a continuance on the showing made.

The verdicts in all these cases were against the claimant, and he was allowed, by consent, to embrace all the cases in one bill of exceptions.

CLARK & LIPPIIT, for plaintiff in error.

VASON & DAVIS, STROZIER & SMITH, HINES & HOBBS and IRWIN & BUTLER, for defendants in error.

the Court.—STEPHENS, J., delivering the opinion.

useless to consider the errors assigned in this case, never many there may be, with all of them corrected, ult of a new trial could not be different from the pre-dict. A verdict for the claimant in this case could and if rendered, and it would be trifling with justice a new trial in order to afford an opportunity of rendering a verdict which could not stand when rendered. The in execution made a clear *prima facie* case by showing fi. fa. and possession in defendant, while the claimant showed not one particle of evidence of title in himself. He made no attempt to show title in himself, but all his efforts to showing title in another person—

The true issue in a claim case is, whether or not the claimant has such an interest in the property as entitles him to prevent the sale of it, and he is not allowed to show title in a third person. Such proof is irrelevant.

The Court affirmed.

DOE vs. ROE.

granting leave to sell the land of a testator, granted by the Court of Appeals upon the application of the administrator with the Will annexed, whether passed on legal reason or without reason; and a sale unless the title of the testator.

ent, from Dougherty county. Tried before Judge McTear, June Term, 1859.

sons of John Sikes, deceased, being legatees under his will, brought their action of ejectment against the defendant, to recover a certain lot of land.

Doe vs. Roe.

On the trial, it appeared in evidence, that John Sikes, when in life, had devised all his real and personal property (except certain negroes) to his wife, Winney D. A. Sikes, which he desired should be kept together and managed by her as her judgment might dictate; and that she should divide the same equally between herself and the children, to be given off to the latter as they should come of age or marry. She was appointed sole executrix. Mrs. Sikes died after the probate of the Will; and thereafter Benjamin M. Griffin, having been appointed administrator *de bonis non* with the Will annexed, applied for, and obtained leave to sell all the real estate of said John Sikes, deceased—no special reason being assigned therefor. When the order granting this leave to sell was offered in evidence by defendant, counsel for plaintiff objected thereto, on the ground that it was not properly granted.

The Court overruled the objection, and plaintiff excepted.

Objection was made, also, to the order granting letters of administration to said Griffin, on the ground of irrelevancy, which was also overruled.

Griffin, as administrator, afterwards duly sold the premises in dispute, in pursuance of the said order of the Court of Ordinary, to one Green Tinsley.

After the evidence closed, counsel for plaintiff requested the Court to charge the Jury, "that the order granting leave to the said Benjamin, as administrator aforesaid, to sell said land, and the said deed so made by said administrator, did not take the title to said land out of the plaintiffs," which charge the Court refused to give, and the plaintiffs excepted.

There was a verdict for defendant.

SLAUGHTER, for plaintiffs in error.

CLARK, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

The validity of the outstanding title which was set up by this defendant in ejectment, depends upon the validity of the order to sell, and the validity of the order to sell depends upon the power of the Court of Ordinary, to pass it without

reason appearing for its passage. Undoubtedly, the Court ought not to have passed it without a legal reason, the question is, Had it the legal power to do it? Whether the Court of Ordinary be called a Court of general, or a Court of limited jurisdiction, is very immaterial; for in giving this order, it had the two requisites which give validity to any Court, and without which the action of no Court has validity—it had jurisdiction over the subject matter, and it had a *case legally brought before it*, calling for the exercise of that jurisdiction. No Court has power to act without both these, and any Court has power to act with either. The Superior Court has jurisdiction over the general subject of crimes, and over the general subject of titles to land; it has no power to order a man to be hung, nor to order a man to be turned out of possession of land and put in, without first having a case brought before it in the manner prescribed by Law. Without this, its judgment is a nullity, and everybody may treat it as such. But the Court has jurisdiction over the subject matter, and with a case brought before it, it may render within the scope of its jurisdiction a judgment which it may render within the scope of its jurisdiction, whether rendered properly or improperly. The Court must follow the Law in getting possession of a case, whose subject matter it has jurisdiction, but after it has got it, whether it proceeds according to Law or against Law, its judgment will be valid until reversed, if it is within the scope of the case, that is to say, if it be such a judgment as is properly rendered in any case of that class. Now the Court of Ordinary has jurisdiction over the subject of selling the land of testate and intestate estates; in the Statute says over “all such matters and things as may or relate to estates of deceased persons, whether testate or intestate.” The legal mode of bringing a case under the Statute before it, is by application of the administrator to sell. There was such an application in this case. The case was in possession of the Court, and its judgment being appropriate to that class of cases, is valid, whether it was passed on good reason, or bad reason, or against reason, and the sale under it is valid as to the title of the testator.

It is affirmed.

Scott vs. Turpin & Volker.

SCOTT vs. TURPIN & VOLKER.

An appeal entered by a trustee under the Pauper Law ought to be dismissed when the affidavit states, that his inability to give security arises not from the poverty of the trust estate, but from his own poverty.

Motion to dismiss Appeal, in Dougherty Superior Court. Decided by Judge ALLEN, at June Term, 1860.

Turpin & Volker brought an action against Henry A. Scott, as the trustee of his wife, Virginia A. Scott, to recover \$121.99 alleged to be due them by account.

At the December Term, 1859, a verdict was rendered in favor of the plaintiffs for the amount sued for, from which judgment Henry A. Scott entered an appeal, by affidavit, in which he states: "That he is unable to pay cost and give security as now required by Law, in cases of appeal; that he is advised, and believes, that he has good cause of appeal, and that owing to his poverty, he is unable to pay the cost and give security, as required by Law."

At the June Term, 1860, counsel for the plaintiffs moved to dismiss the appeal on the ground, that the affidavit did not show, that Scott's inability to pay cost and give security to enter the appeal was owing to the poverty of the trust estate in his hands, which the plaintiffs were seeking to make subject to the payment of their claim.

The presiding Judge sustained the motion and dismissed the appeal, and that decision is the error complained of.

STROZIER & SMITH, G. J. WRIGHT, VASON & DAVIS for plaintiff in error.

WARREN & WARREN, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

This was an appeal under the Pauper Law by a trustee. We think that the appeal was properly dismissed upon the ground, that the affidavit did not state that his inability to give security arose from the poverty of the trust estate. It

Hawthorn vs. Kelly.

that he was unable from his *own* poverty. If he had security, it would have been *as trustee*, the security making, not for him, but for the estate; and we don't at his individual poverty had to do with the matter. Security would have become responsible for nothing but actual solvency of the estate, which might depend, to a great extent, upon the fidelity of the trustee, but not at all upon his personal resources.

Verdict affirmed.

HAWTHORN vs. KELLY.

The case will be dissolved when there is other relief more appropriate to the circumstances.

Verdict, in Decatur Superior Court. Decision on Decatur made by Judge ALLEN, at October Term, 1859.

Record in this case presents the facts following, that

Hawthorn executed a deed, of which the following

indenture, made the 9th day of May, 1814, between John Hawthorn, Sr., of the one part, and the children of John Hawthorn (the son of said John) and his wife, Melitia, of the other part, *witnesseth*: That the said John Hawthorn and in consideration of the natural love and affection which he hath toward William and his wife, Melitia, and their children, hath lent unto the said William and Melitia, and negro girl named Kate, and her increase, during the lifetime of the said William and Melitia Hawthorn, the sum of one thousand dollars, and the same to be repaid by the said William and Melitia Hawthorn above loan is here to be understood, that the said William and Melitia Hawthorn stand as the natural

Hawthorn vs. Kelly.

guardians of their children during their natural life, relative to said girl and her increase, and that this be understood, that I have this day given unto my grand-children the children of said William and Melitia, that is to say, Polly, Hannah, Milbury, Jonathan, Elias, Claiborne, Owen, William Ryan and Joshua Thomas, the said negro girl, Kate, and her increase, forever, free from the claim or claims of any or every person or persons whatever, so that they shall have, use, and peaceably enjoy, the said negro with her increase forever, as above described, through the medium of their parents during their lives, then the above negro or negroes to be equally divided among my several grand-children above named. In confirmation of the above deed of gift to my grand-children, I hereby warrant and defend the right of the above girl and her increase in my said grand-children their assigns forever."

Under this deed, William and Melitia Hawthorn took possession of the negro and kept her until the death of William, and that she is still in Melitia's possession. The increase of the negro girl consists of nine negroes of the aggregate value of seven thousand dollars.

Melitia Hawthorn together with one of her sons, William B. Hawthorn, placed one of the negroes in possession of one Eliza Garland, who has made efforts to send or carry him out of the State, and claims a title to or interest in said negro.

Of the children mentioned in the deed, two are dead, to wit: Jonathan and Joshua Thomas.

Milbury married James Kelly; Polly married Robert Jones, and Hannah married Ebenezer Lee.

Kelly and wife, Jones and wife, and Lee and wife filed a Bill in Equity against Melitia Hawthorn, William B. Hawthorn and Eliza Garland, in which the facts before stated are alleged, and in which it is also stated that they are apprehensive that the negroes, or some of them, will be removed from the State, and the rights of complainants will be defeated.

The Bill prays for a *ne exeat* or *quia timet*, or other sufficient process, to restrain the defendants from removing said negroes from the State, or compelling them to give security for the forthcoming of the negroes to answer the demand of complainants at the death of Melitia Hawthorn.

Hawthorn vs. Kelly.

cess issued, pursuant to the prayer of the Bill, for the of the negroes and their safekeeping, unless the se- aforesaid should be given.

defendants met the Bill with a demurrer thereto, for f Equity, and on the ground, that the interest or title plainants, under the deed aforesaid, was not sufficient ble them to maintain the Bill.

r argument had thereon, the Court overruled the de- , and that decision is the error alleged in the record.

STYRE & YOUNG, for plaintiffs in error.

& SIMS, *contra*.

ie Court.—STEPHENS, J., delivering the opinion.

hink the *ne exeat* ought to have been dissolved in e, because we do not think the complainants are re- men in the whole property, as claimed in the Bill.

very clear from this deed that the parents were in- to take any beneficial interest at all, and we think re certainly not intended to take more than a joint ith the children during the lifetime of the longest the two parents, with remainder in fee to the chil- in the supposition that the parents take no beneficial then they were mere trustees for the children, and

was no longer any purpose to be served after all ren had ceased to be minors, the trust ceased, and en became entitled, and are now entitled, to main- er for the whole of the property, and to have bail tion in case of danger, as alleged in this Bill, of rty being removed. On the supposition of a joint

the parents and children during the life of the ver of the parents, the children are entitled to a of the property, leaving the surviving parent a life one share of it, together with an account of the ts of the joint life estate. If, after such a parti- remainder interest of the children in the part fall- eir mother should be endangered, they would un- be entitled to a *ne exeat* as to that part; but the is, that the partition, as the matter now stands, ove all danger. We incline to think the deed estate of the latter description.

it reversed.

Williams vs. Hamilton.

WILLIAMS vs. HAMILTON.

When it is difficult to determine upon which side the evidence preponderates the judgment of the Court below, whether granting or refusing a new trial, will not be disturbed.

Admitting illegal testimony, which is wholly immaterial, is no sufficient ground for granting a new trial.

Newly discovered evidence, to constitute a good ground for a new trial, should be material and pertinent to the issue.

Attachment, from Dooley Superior Court. Tried before Judge LAMAR, October Term, 1859.

Ashley B. Hamilton instituted his suit by Attachment against the plaintiff in error, Williams, to recover the amount due upon a promissory note given by the latter for \$150, on the 2d day of November, 1857.

The defendant set up in defense, that the note was given for a horse which the plaintiff, at the time of the trade represented as sound, but that in fact he was then unsound, and died in less than two days thereafter with a disease called the "staggers;" that plaintiff knew at the time the horse was unsound, and induced defendant to give said note for him by deceitful representations as to soundness, &c.

In the course of the trial, the defendant proved by Dr. Young that he was present at the trade, and plaintiff represented the horse to be sound so far as he knew; witness thought the horse unsound at the time of the trade; understood he died; thinks he lived about thirty-six hours after the trade was made; saw plaintiff the next evening after the trade was made; he said he believed the horse would die; plaintiff said the horse did have the "staggers" very bad; from what the plaintiff said and did, the defendant bought the horse as sound, and agreed to give a sound price: but from the condition of his hair and difficulty of breathing, witness considered him diseased, and of very little value; did not hear plaintiff warrant him as sound, but he gave defendant reason to believe him to be sound from his conversation.

Defendant proved by one Williams the above facts in substance, and, also, that when defendant took possession of the horse, he was turned into a field where he remained

from about two o'clock in the afternoon until sundown, when witness took him out of the field and fed him; witness then noticed that the horse would not eat or drink; food and water were frequently offered to him and he refused both; never ate or drank from the time defendant bought him until he died, so far as he saw, and he saw him most of the time; he died on the evening of the next day after defendant bought him; plaintiff and defendant had talked about the trade for some weeks before it was made—had not been able to agree on the price; there were peas in the field into which the horse was turned after the trade; the plaintiff, at the time of the trade, reserved the use of the horse to make a trip to Lee County; but afterwards got another from defendant for that purpose, the former being, as he said, a rough riding horse.

In rebuttal, William Hamilton testified: he knew the horse in question; plaintiff told witness that he, plaintiff, was going over into Lee County, and spoke to witness about selling the horse, and asked witness, if he were in plaintiff's place if he would take \$150 for him, and witness told him he would; this conversation took place eight miles from defendant's house; he was not present at it; the horse usually had a rough coat of hair, and had had a cough, which was supposed to have been the result of distemper.

Elisha Roberts testified: That he was acquainted with the disease in horses known as the staggers; that a horse might have it for a week before it would produce death, and might also die with it in two days; there were two kinds of staggers; if a horse were affected in the right side by one kind, he would turn round on the right side; and if on the left, he would turn round on the left; when affected by the other kind, a horse would look sleepy, hold his head down, and water would run from his eyes; that where several persons are examining a horse with the staggers, it would, in his opinion, be perceptible; he is acquainted with diseases in horses.

There having been a verdict for the plaintiff, defendant moved for a new trial on the following grounds:

1st and 2d. That the verdict was contrary to Law and evidence.

3d. That the Court erred in charging the Jury: That unless there was a warranty of soundness of the horse for

Williams vs. Hamilton.

which the note sued on was given, the defendant must prove that the horse was unsound at the time that plaintiff sold him, and that plaintiff knew of his unsoundness at the time.

4th. That defendant has, since the trial, discovered new, material and important evidence for him in said cause, and of which he was ignorant at the trial, and which is shown by the affidavits of Hiram Williams and William Smith.

5th. That the Court erred in allowing to be introduced by the plaintiff as evidence, the sayings of plaintiff as to his going to Lee County, and as to his intention to sell the horse—the defendant not being present.

William Smith states in his affidavit: That some time in the latter part of the Summer, or beginning of the Fall, of 1857, he saw a large bay horse in the possession of and belonging to plaintiff, which he, Smith, then believed, and still believes, to have been unsound at that time; the attention of said plaintiff was then called to the unsoundness of the horse by the remark of some person in the hearing and presence of plaintiff, that said horse was unsound or diseased, or something to that effect.

Defendant states in his affidavit, that he had no knowledge of what could be proven by said Smith until after the trial.

The Court overruled the motion for a new trial on all the grounds taken, and counsel for defendant excepted.

RODGERS & DEGRAFFENREID, for plaintiff in error.

CLARK, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

We should not have felt constrained to send this case back had the judge granted a new trial. Neither do we feel forced to reverse him for refusing it. It is difficult to say that the evidence decidedly preponderates on either side.

As to the conversation between the plaintiff and witness, William Hamilton, it should not have been admitted. But it amounts to nothing. The point of it is, that Ashley B. Hamilton, on his way to Lee County when he sold the horse, asked the witness if he would advise him to take \$150 for the horse, he having been holding him at a higher price.

Roe and Hays vs. Doe, ex dem. Morrison.

is in proof, that previous to this time, Ashley B. Ham-
 had been at the house of Williams when he was absent,
 ated that he would take \$150 for the horse, but that
 did not come back there to sell him.

, as to the newly-discovered evidence. The defense
 to the note is, total failure of consideration, because
 se had died within thirty-six hours after he was sold,
 l staggers. By Smith the defendant will be able to
 hat he saw the horse in the latter part of the Sum-
 beginning of the Fall, of the year before he was
 November. He thought him then unsound, and
 he attention of the plaintiff to the fact.

Smith states nothing as to the nature of the un-
 ss. It is admitted that the horse had a cough from
 er. This may have been the unsoundness noticed
 th and others. To make the evidence pertinent and
 , it ought affirmatively to appear, that this unsound-
 connected with the disease of which the horse died.
 ay have been a trick practiced upon Williams. I
 e was. The proof, however, fails to establish it.

E & HAYS vs. DOE *ex dem.* MORRISON.

tute of Limitations does not commence running in favor of a ten-
 session of land, so long as he disclaims owning the land. In such
 olds in subordination to the title of the true owner.

on of land must not only be adverse, but continuous, in order to
 a Statutory title. Nor will it suffice to prove seven years con-
 session by different tenants, between whom there is no privity.
 ise, the different tenants are but successive trespassers as against
 the true owner.

ent; from Calhoun Superior Court. Tried before
 LEN, at November Adjourned Term, 1859.

Roe and Hays vs. Doe, *ex dem.* Morrison.

The defendant in error brought his action against plaintiff in error to recover lot of land number 227, in the 4th district of originally Early County.

On the trial, plaintiff in the Court below introduced the following evidence :

William R. Hatcher testified : That he was acquainted with said lot ; had known it about five years ; M. A. Hays was living on it.

Abraham Dyer testified : That M. A. Hays resided on the land in the Spring of 1851.

Plaintiff then put in evidence a grant from the State for said lot to Jack Johnson, dated 23d day of August, 1839 ; also, a Deed from Jack Johnson to L. L. Morrison, the plaintiff, dated the 25th day of June, 1841, recorded 3d day of August, 1849, for said lot.

Plaintiff here rested his case.

Defendant then introduced the following evidence :

M. McCorquadale testified : That he knew the premises in dispute ; that in the Fall of the year 1842, Thomas Hunt built a dwelling house on the lot, and about that time cleared about twenty-five acres of it ; built a school house on it, and also cleared some four acres more about the same time near the dwelling house ; when Hunt took possession, he spoke of the lot as his own, and exercised acts of ownership over it, such as clearing land, cultivating the same and building houses ; he claimed also the unenclosed portions and exercised such acts of ownership over it as men usually do over their lands, getting timber, firewood, rails, &c. He occupied the place in 1843, and made a crop upon it. In 1844 Thomas Street went into possession, but does not know under whom, and cultivated it for that year ; that one Bagwell went into possession in 1845 ; Hunt moved to Macon in January, 1844, and came down here again in 1854, and went to William Sutton's house that Hunt had sold to Sutton in 1845 ; Bagwell left the land, and Sutton went into possession, and sold to Joel McDaniel in 1845 ; McDaniel went into possession and occupied and cultivated the land in 1846, and claimed it as his own ; McDaniel sold to James Owens in 1846 ; Owens did not go into possession, but sold to William Hays the same year, who went into possession.

Reuben McCorquadale testified : That Thomas Hunt "settled" the lot in the Fall of 1842, by building a dwelling

and a school house, which was used by his wife, clear-out thirty acres on the west side of the house, and four acres near the house; made a crop on it in 1848; Street occupied and cultivated it in 1844; Bagwell did it in 1845; McDaniel in 1846, and William Hays; Hays' widow (M. A. Hays) occupied it up to the commencement of the action; Bagwell abandoned the place, and without gathering his crop, in the early part of Fall of 1845; Sutton was the next in possession af-

ter defendant then introduced a deed from Thomas Hunt to Sutton, dated 1st October, 1845, for said lot; a deed from Sutton to McDaniel, dated 10th Nov., 1845; a deed from McDaniel to James Owens, dated 1st July, 1846, and a deed from Owens to Wm. Hays, dated 28th Sept., 1846, and then closed.

Then plaintiff introduced the evidence of John S. Street, who testified by commission: That after Thomas S. Street moved from Early County, Ga., to the city of Macon, in the year 1845 or 1846, he heard Hunt say that some men from Early County were in Macon, trying to buy a lot of land from Early County from him; does not recollect the party; thinks he alludes to a lot he had some control of at that time in Early; he said that he refused to sell the lot because he had no title or claim to it; cannot recollect the time of the year when he said this; it was during the fall season—probably in the Fall; he was engaged in the business of Sutton at the time; Hunt moved from Early County to Macon in the latter part of 1843 or 1844.

Then the jury, under the charge of the Court, found a verdict for the plaintiff, and counsel for defendant moved for a new trial on the grounds following:

That because the Court refused to charge, as requested, that the title may be proven by the acknowledgment of the vendee in possession, and that tenancy may be shown by the circumstances, as delivering up possession to the land-vendee when required; and that if the Jury believe that

Hunt took possession of the lot, improved and cultivated it in 1842; that Street went into possession under

Bagwell went in under Hunt, and that Sutton, after Hunt, then defendant would be entitled to recover possession continued for the space of seven years before the action was brought.

Roe and Hays vs. Doe, *ex dem.* Morrison.

2d. Because the Court refused to charge the Jury, as requested, that possession must be of such acts of ownership as are definite, notorious and continuous; by going on it, felling trees, using the timber, splitting rails, and such acts as serve to show the character and extent of the claim.

3d. Because the Court refused to charge the Jury, as requested, that if Hunt went into possession in 1842 without paper title, cultivated the land and built houses upon it *bona fide*, and continued so to hold for seven years, and that the seven years were complete before the passage of the Act of the Legislature of 1852, which requires paper title, then the possession was adverse, and constituted a good defense.

4th. Because, when the Jury was about to retire, the foreman asked the Court to explain what was color of title; to which the Court replied, it must be paper title, or some claim of right evidenced by writing.

5th. Because the evidence of John S. Hoge was illegal and improperly admitted by the Court when objected to by defendant's counsel.

The Court overruled the motion for a new trial on all the grounds, and counsel for defendant excepted.

STROZIER for plaintiff in error.

CLARK, *contra*.

By the Court.—LUMPKIN, J., delivering the opinion.

This is an Action of Ejectment to recover lot number 227 of what was formerly Early now Calhoun County. The plaintiff tendered in evidence a grant from the State, and a regular chain of title down to himself. The defendant relied upon the Statute of Limitations.

She proved that Thomas Hunt went into possession of the land in dispute in 1842; that he built houses, cleared land and used the whole as is usual with the owners of land, claiming it as his own; that he occupied the premises, and made a crop upon it in 1843; that in 1844 Thomas Street took possession, but it does not appear under whom he claimed; that one Bagwell succeeded Street in 1845, but there is no evidence whether he claimed in his own right or

tenant of Hunt or somebody else; that Hunt, the settler, moved to the city of Macon in 1844, and land to Wm. Sutton the 1st of October, 1845; that then went out of possession and Sutton went in. Sutton down there is a regular chain of title to Mrs. Hunt made a quit-claim deed only to Sutton, admitting the time that the land did not belong to him, and had no title to it.

el for Mrs. Hays excepts to the refusal of the Court, as well as to the charge as given.

immaterial, however, how many or how great the error which the Court committed. The defendant's title utterly fails, inasmuch as she does not establish continuous possession in Hunt or those claiming under for seven years. It is but five years and a half date of Hunt's deed to Sutton until the action was

So tacking on the possession of Bagwell for on the ground assumed by counsel, to-wit: That by going to Sutton he acknowledged himself a tenant of conclusion not warranted by the proof, still, it is six years and a half; for there is not a particle that connects Street with either Hunt or Bagwell, is reason, to say nothing of the disclaimer of Hunt did not own the land when he made the quit-claim to Sutton in October, 1845, the defense must fail.

The Court ruled the Law just as the defendant's counsel said it to be, and the Jury had found a verdict for plaintiff, we should have felt constrained to set it aside and a new trial.

Springer *et al.* vs. Congleton.

SPRINGER *et al.* vs. CONGLETON.

A legacy to "be divided between my two sisters' children, Elizabeth Jones and Martha Lilly, to-wit," naming the children, goes only to those who were children of the two sisters at the death of the testator, and one of the named children dying before the testator, is to be considered as stricken from the enumeration.

Demurrer in Equity, from Schley county. Decision by Judge WORRILL, October Term, 1860.

The defendant in error, Burton A. Congleton, filed this bill to recover of the Executor of Jesse Cherry, deceased, part of a residuary legacy claimed to be due John Choice, one of the legatees under the Will of deceased, and which the said Choice had assigned to the said Burton A. Congleton for value.

It appears by the bill, that there were six legatees named in said Will; among them the said John Choice and Naomi Lilly; but it is alleged that there were really only five legatees entitled to take under said Will—the said Naomi Lilly having died without issue before the death of and unknown to the testator. It is further alleged that there was due said John Choice, who resides in the State of Alabama, on the first day of January, 1843, by said executor, as the one-fifth part of said residuum, the sum of three thousand dollars or other large sum with interest thereon, except two thousand dollars paid him by the executor in 1845, which, however, did not include any part of the share left to Naomi Lilly; that at that time it was not known to either said Choice or said Springer, that said Naomi Lilly had not survived said testator.

The bill charges that the executor, in order to defeat the collection of the share which would have gone to the said Naomi Lilly, procured Samuel Crawford, of Marion county, to take out letters of administration on the estate of said Naomi, deceased, and paid over to him as such, the sum of two thousand dollars or other large sum of said estate, and which payment was illegal and void. Prayer for *re creat.* on the ground that said Springer, executor, was threatening and preparing to remove out of the State.

The defendants demurred to the bill on the grounds following:

There is no equity in said bill.

The complainants cannot maintain said bill, because it is illegal and champertous, as appears from said

because said complainants are entitled to no share or the interest devised to Naomi Lilly under the Will of Cherry, deceased.

Court overruled the demurrer, and counsel for defendant.

ORD and CRAWFORD and H. K. McCAY, for plaintiff.

LL, for defendant.

Court.—STEPHENS, J., delivering the opinion.

use turns solely upon the construction of the last the Will. Did the testator intend to give the estate to certain persons whom he names, and who happened to be the children of his two sisters? or did he intend to give it to a class described as children of his two sisters, including all within the class, and none who did not fall within the class, the names of the children being mentioned only as a correct enumeration of the individuals who composed the class? He says "it shall be divided with my two children, Elizabeth Joice and Martha Lilly, to-wit," &c., children, and Naomi Lilly among them. This is a class, "sisters' children," and to individuals named, &c., the two ideas being supposed by the court to be so perfectly coincident and harmonious, that the first may be really used as a description of the other. But we think the class was the *leading* idea. The *blood* seems to be the motive, and we think the intention was that the estate should go to all who were children of those two sisters, and to none who were not children, that is to say, to those who answered the description, and to none who did not answer it at the death of the testator, that being the time when the Will speaks. The blood of those two sisters being the motive of the gift, it is a fair inference that the gift, by enumeration of individuals, was subordinate

to the general description which is necessarily precisely co-extensive with that motive. The motive of the gift throws a strong light upon the *extent* of it. We naturally expect the gift to go as far as the motive carries it, and *no further*. Naomi was not one of the children of the two sisters, at the death of the testator, though she had before been one of them, and he supposed that she still was. She, therefore, was not within the motive of the gift, and for that reason, we think she was not within the gift. The other children of the two sisters were within the motive and nobody else was, and we think the other children took the whole gift. There were a number of cases cited by the plaintiff in error to the effect that a residuum given to several in joint-tenancy, will go to the survivors when one of them dies before the death of the testator, but when given in tenancy, in common, (as this is) it does not go to the survivors, but the portion of the deceased tenant in common lapses, and creates an intestacy *quoad hoc*. That doctrine is not applicable to this case. In all those cases, the question was as to the effect of the death of a person who, as an individual, was known to have been certainly intended as a legatee; but here the very question is, *what* individuals were intended? Were the intended legatees the very persons named and no others, or were they the persons included in a described class? Contrary to the testator's expectation, there turns out to be a conflict between his *two descriptions* of the legatees, and the real question is, which description must yield to the other? A different state of surrounding circumstances might throw a different light on the words used in this Will; but under the few facts which appear in this case, we think that the objects of the testator's bounty were only those who, at his death, were children of his two sisters.

Judgment affirmed.

WOODING *et al* vs. MALONE *et al*.

injunction which the chancellor has in retaining injunctions after the of the bill is sworn off by the answer, will be controlled in a case where ention of the injunction operates injuriously upon the defendant's ss, and is not necessary to the protection of the rights of the complain- mitting his rights to be what the bill asserts, and the answer denies.

Equity, from Sumter Superior Court. Decision by ALLEN, on 19th April, 1860.

les J. Malone and Joseph W. Rowland, filed a Bill in against John W. Wooding, in which it is alleged: rsuant to a contract between Malone and one Rich- nn of the one part, and William M. Meadows, Moses dows, and M. L. Gardner of the other part, Malone nn constructed and finished a certain building in the Americus on Lamar street, furnishing the materials , in consideration of which Gardner and the Mead- ere to, and did execute to Malone and Brinn titles to er story of the building, and also to one half of the lying nearest the public square of said city; that and Brinn entered into the possession and enjoy- the building according to the agreement, and so re- until interrupted by the defendant Wooding.

ill also alleges, that Wooding obtained Malone's per- to put some carriages and buggies in the buildings a negotiation between them for a sale to Wooding of est of Malone and Brinn in the buildings, and that t time he has kept possession of the premises, and ged the structure of the house, and pretends that he hased the same from Malone, which is untrue.

ll also alleges, that there is a mistake in one of the de to Malone and Brinn, and that they have com- an Action of Ejectment against Wooding for the and for mesne profits.

ll prays a reformation of the deed, and that Wood- be enjoined from using or changing the buildings. ng filed his answer, setting up an absolute sale of ing by Malone to him, with Brinn's consent; and land bought Brinn's interest with a full knowledge e facts and of Wooding's purchase. The answer

Wooding *et al.* vs. Malone *et al.*

denies every fact and circumstance on which the equity of the bill is based, and shows that the business of Wooding would greatly suffer by the continuance of the injunction.

Upon the coming in of the answer, a motion was made to dissolve the injunction because the answer abnegated the equity of the bill.

Upon the hearing, the presiding Judge not only refused the motion to dissolve the injunction, but also appointed a receiver to take possession of the buildings and rent them out pending the litigation.

This decision is complained of as error.

WORRILL and HAWKINS, SULLIVAN and BROWN, for the plaintiff in error.

W. A. HAWKINS and S. C. ELAM, *contra*.

By the Court.—STEPHENS, J., delivering the opinion.

This answer swears off the equity of the Bill, and a continuation of the Injunction would operate injuriously to the defendant's business, and would do the complainant no good. There was no reason for an injunction from the beginning, nor for the appointment of a receiver. The case is simply a contest between the complainants and the defendant, Wooding, as to which is entitled to a certain building, and the complainants would have no ground to go into a Court of Equity at all, but would be left to their remedy at Common Law, were it not for the alleged mistake in their deed which they seek to have corrected. If they succeed in that, and in their claim to the house, they will also get compensation for the use and occupation, and damages for any injury Wooding may have done to the house by changing the structure of it. There is no pretence that he is not able to respond for all these things. Their remedy will be adequate and complete without any injunction or any receiver, and the receiver ought not to have been appointed, and the injunction ought not to have been granted.

Judgment reversed.

McDANIEL, Adm'r, vs. HOOKS.

an administrator in selling land which is encumbered with a vendor's proceeds with the purchaser, before the sale, to take up the lien, he is to allow the lien in settling with the purchaser.

plaint, in Lee Superior Court. Tried before Judge
18, at March Term, 1860.

rt L. McDaniel, as administrator of Jacob Shiver, de-
instituted suit in Lee Superior Court, against Jesse
ks and Hardy Hooks, to recover the sum of a prom-
ote signed by the defendants, and payable to the
for \$371.84.

the case came on for trial, the defendants proposed
by Dr. Munroe, that the note sued on was given for
land sold by plaintiff at administrator's sale, of
sse Hooks was the purchaser; that pending the sale,
told Hooks that he held a note on Shiver, the de-
which was given for the same lot of land, and that it
ed that if Hooks became the purchaser of the land
le, and would take up the note from Munroe, that
tiff would accept it as a credit or payment on the
l on as far as it would go; that pursuant to this
t, Hooks purchased the note from Munroe.
esiding Judge excluded this testimony, and a judg-
rendered for the plaintiff for the full amount of
ued on.

l for defendant moved for a new trial on the ground
Court erred in excluding the testimony.
rt granted the new trial, which is the error alleged.

VEST, for plaintiff in error.

c BUTLER, *contra*.

Court.—STEPHENS, J., delivering the opinion.

case, an administrator sued on a note which was
m for land which he, as administrator, had sold as

McDaniel vs. Hooks.

the property of his intestate. The evidence offered in defense against the note was, in substance, this: The deceased not having paid the entire purchase money for the land, died leaving his unpaid note for the balance, constituting a vendor's lien on the land. The administrator when about to sell the land, which he must have sold subject to the vendor's lien, or cleared it from the lien by paying up the remainder of the purchase money due by his intestate, agreed with the defendant to accept that outstanding note of the intestate as a set-off against the price which the defendant might give for the land at the administrator's sale which was about to take place, if the defendant would buy the land. He did buy it, and in giving his note for the price, had it understood that the other note which had a vendor's lien was to be allowed as a set-off. The defense asked that this set-off might be allowed, and that the evidence which proved it, might be admitted. We think the defense was a good one, and that the Judge was right in granting a new trial, because the evidence had been rejected. The substance of the administrator's promise was to clear the land of that vendor's lien, and the clearing of the lien was a part of the consideration of the note which the defendant gave. Now, when he refuses to clear the lien by taking up the note which constitutes it, there is a partial failure of consideration.

Judgment affirmed.

NOTE.

ING to the death of the Reporter, by whom the cases in this volume were reported, as well as frequent changes of printers during its publication—they and one of the authors having entered the army of the Confederate States—some errors have unavoidably occurred. Most of these are, however, such as the intelligent reader would readily detect.

The following ERRATA is given for the correction of such as occur in the *Head Notes* to the cases.

These corrections are also made in the Index to the

ERRATA.

hear," in the third line of the second Head Note to the case of *Walter et al. vs. East*, read "*have*."

Courts," in the first line of the second Head Note to the case of *Grimes vs. Anton*, p. 330, read "*Courts*"; and for "*damaigled*," in the fourth line of the Note, read "*damaigled*."

W," occurring just before "*answers*," in the third line of the fifth Head Note to *Molyneux vs. Seymour, Fanning & Co.*, p. 440, read "*M*"; and for "*W*," in the same Head Note, read "*M*."

the," in the seventh Head Note to the case of *The Water Lot Company vs. Leonard*, read "*the*."

an," immediately following the word "*possession*," in the fourth Head Note to the case of *Ham vs. Holman*, p. 612, read "*of*."

here," in the third line of the Head Note to the case of *Brown vs. Ricks*, p. 777, read "*here*."

desired," in the third line of the second Head Note to the case of *Shine vs. Reddy*, p. 780, read "*decreed*."

and," in the fourth line of the Head Note to the case of *Scott et al. vs. Winship*, read "*remand*."

ed," in the second Head Note to the case of *Cook vs. Wood*, p. 891, read "*of*."

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

INDEX TO VOLUME XXX.

ACCORD AND SATISFACTION.

Compromise.

ACTION.

whose land is seized by the corporate authorities of a city,
public use, may maintain an action for its value.

Corporation and Council of Rome vs. Perkins..... 154

action to recover damages for the killing of a slave,
not be preceded by a prosecution for the felony.

Commonwealth vs. Fambro..... 232

in the vendors of marble ordered from a distance de-
liver it to the common carrier in pursuance of the order,
the silence of the order on that point, in pursuance
of the course of trade in the article, their part of the con-
tract is performed, and their right of action for the price of
marble is complete, and will not be defeated by their
subsequent unauthorized settlement of a policy of insur-
ance in favor of the vendee. *McCawley vs. Sheldon et al.*... 832

action for breach of contract survives against the execu-
tor of the defendant. *Dempsey vs. Hertzfeld*..... 866

if the book produced, as the book of original entries,
is in a mutilated condition, the entries against the defend-
ant, the hand-writing of the plaintiff, and no witness
testimony that plaintiff kept correct books, or that he knew
of the dealings between the parties, the testimony is insuf-
ficient to justify a recovery. *Cheever vs. Brown & Brown*.. 904

6. Where a plaintiff dismisses his action during vacation, under the Act of 1848, and the Clerk neglects to make entry of the fact, the omission may be cured at the next Term of the Court, by a *nunc pro tunc* entry.
Mountain vs. Rowland & Ansley..... 929
7. In an action on a Sheriff's bond for a breach of his official duty, his sureties may avail themselves of a prior judgment rendered in favor of the Sheriff on a rule for the same alleged breach of duty. *Brown vs. Bradford et al.*..... 927
8. M. sues out a writ against K., returnable to May Term, 1859, of the Court. Service is duly acknowledged by the defendant, and process waived in April. The case is not docketed until November Term thereafter, when the parties appeal by consent. *Held*, That the defendant is not entitled to have the case dismissed upon the appeal, because it was not docketed at the appearance Term in May, 1859.
Moise vs. Knapp..... 942
- See Lost Papers, 1.*

ADMINISTRATORS.

1. An administrator is not liable for interest during the first year after his appointment, unless he actually makes interest. *Allen vs. Hardee et al.*..... 463
2. The Act of 1850, authorizing foreign administrators to sue in this State, applies as well to actions *ex delicto* as to actions *ex contractu*. *Averitt, Adm'r, vs. Pope, Adm'r.*..... 660
3. If an administrator illegally sells the property of his intestate's estate, and becomes himself the purchaser, and the heirs elect to rescind the sale, he will be decreed to convey to them the property remaining in his hands unsold, and to account for that which he has disposed of by gift or resale, at the highest value.
Shine vs. Redwine and wife..... 789
4. The *ex parte* orders of the Ordinary, are no protection to the administrator for his illegal acts. *Ibid.*
- See Equity, 4.*

ADVANCEMENTS.

1. The doctrine of bringing advancements into hotch-pot, has no application when there is a will which does not require it to be done. *Breton et al. vs. Breton et al.*..... 416

ADVERSE POSSESSION.

1. The possession of the vendee under a bond for titles, is not the possession of the vendor, (especially when the former repudiates the title of the latter,) so as to perfect the Statutory title of the vendor, by reason of the adverse holding of the vendor and vendee.
Payne vs. McKinney & Whilow..... 83
2. The cutting of timber will not constitute an adverse possession of the land, nor will proof of particular acts at different times create a Statutory title.
Durham vs. Holman..... 619
3. No matter what the acts of a defendant may have been, or what claim he may have asserted to the land in controversy, unless he has been in the actual possession of the land, by himself or his tenant, openly, notoriously, visibly and continuously for seven years previous to the commencement of the suit, under color of title and claim of right, the Statute of Limitations will not protect him against the true title.
Ibid.
4. The attornment of the plaintiff's tenant to defendant without the knowledge of plaintiff, and such tenant's continued possession under defendant, is not such adverse possession as will create a Statutory bar to plaintiff's right of action.
Buckner vs. Chambliss..... 652
5. Where a tract of land is held and known as a whole, a possession of a part may be a possession of the whole to the extent of the paper title under which it is held. And so, too, where the whole tract, as such, is claimed by the adverse party, then perhaps the possession of a part may be construed into the possession of the whole. But where a tract or settlement of land is made up of different lots or parcels, and the adverse claim is to one only, then the possession of another part of the tract cannot ripen into a Statutory title as against the particular lot claimed.
Wiley vs. Warmock et al...... 701

6. Where five or ten acres of a lot of land, covered by water, is enclosed by a fence, in the absence of all proof to the contrary, the presumption is, that the lot is done by virtue of the claim of right to the premises so enclosed; and especially when the act is accompanied by a contemporaneous declaration that both that lot, and the one contiguous, all belong to the occupant. *Ibid.*
7. Possession of land must not only be adverse, but continuous, in order to ripen into a Statutory title. Nor will it suffice to prove seven years continuous possession by different tenants, between whom there is no privity. In such case, the tenants are but successive trespassers, as against the title of the true owner.
Roe & Hays vs. Doe, ex dem. Morrison..... 971

ALTERATION.

See Promissory Notes, 1.

AMENDMENT.

See Garnishments, 3.

APPEALS.

1. If an issue, traversing the truth of the grounds upon which an attachment issues, be tendered at the trial term, and be disallowed by the Court, an appeal on the merits will not carry up such preliminary question.
Neal vs. W. N. & W. Bookout..... 40
 2. *The State vs. Dean*, 9 Ga. Rep., 400, and *Armstrong vs. The Oglethorpe Bridge & Turnpike Co.*, 18, Ga. Rep., 600, reaffirmed. *Jones vs. The Wills Valley R. R. Co.*..... 43
 3. An appeal may be entered from a confession of judgment, without reserving the right to appeal. *Easter vs. Snelling*. 503
 4. There is no appeal under the Act of 1856, directing the mode in which one year's provision shall be set apart for the family of the deceased. *Pope vs. Hays*..... 559
 5. The rights and liabilities of a party not appealing, are determined and fixed by the first verdict; nor can they be changed by any further proceeding on the Appeal Trial.
Durham vs. Keaton et al...... 590
- See Justice's Court, 3.*

ARREST.

See Criminal Law, 8, 9, 10.

ATTACHMENTS.

1. The preliminary issue authorized by the Act of 1855-'56, to traverse the truth of the affidavit in relation to the ground upon which the attachment issued, must be tendered at the return Term of the attachment.
Neal vs. W. N. & W. Bookout..... 40
2. Where the issue traversing the truth of the ground upon which the attachment was issued, was tendered at the trial Term of the attachment, and disallowed by the Court, an appeal upon the merits does not carry up this preliminary question. *Ibid.*

ATTORNEYS.

See Continuances, 2; Witnesses, 9.

BAILEMENTS.

See Common Carrier.

BANKS.

1. The fourth rule of the sixth section of the charter of the Planters' & Mechanics' Bank of Columbus provides, that the total amount of its debts shall at no time exceed three times the capital stock actually paid in, over and above the specie actually deposited in its vaults for safe-keeping. In case of excess, the Directors were made personally liable for the same. On the 27th January, 1842, and 23d February, 1842, the Bank issued to George Hargroves two certificates of deposit, payable to his order on the certificates, with interest from date. The defendants are the only survivors of the then seven Directors: five are dead, four of them having representatives with estates in the jurisdiction of the Court, and who could be joined in the suit. On the 12th June, 1848, a judgment of forfeiture and dissolution of said corporation was rendered by the Superior Court of Muscogee county, upon proceedings instituted for that purpose, and directed by Acts of the Legislature of 1840 and 1842. By the Acts, the judgment was to declare a dissolution for

all purposes except the right to collect and pay its debts, to sell and convey its real and personal estate; the judgment contained no such saving. On the 26th May, 1843, the Bank assigned all its property and assets of every kind to B. B. A. to pay debts, &c. The Legislature, in December, 1843, passed another Act, reciting that the decrees of forfeiture had been rendered, "as provided for and contemplated by said Acts," and assignment made, which was by that Act declared to be valid; the assets of the Bank, from neglect or waste of assignee, were lost. By the terms of the charter, the corporation was to continue until the 1st of January, 1857. Suit was brought against the defendants, as Directors, for the amount of the two certificates of deposits: *Held*—

1. That the plaintiff was not bound to join the representatives of the deceased Directors in the action against the survivor, although under the Act of 1818 he might do so.
2. That the certificates of deposits were not obnoxious to the Act of December 26th, 1837, "to restrain, prevent and make penal the paying away, &c., any bank bill, &c., intended and for circulation, &c., as paper money, having longer time than three days to run after its date before redeemable, &c., payable otherwise than in gold and silver."
3. That these certificates are such debts as are, within the meaning of the fourth rule of the sixth section, for the excess of which Directors are liable.
4. That the loss of the assets of the Bank in the hands of the assignee, and from the neglect or waste of the assignee did not relieve the Directors from their liability, but was the loss of the corporation.
5. That the liability of the Directors for these debts was a Statutory liability, and not barred by time until after twenty years.
6. That the judgment of forfeiture did not extinguish the liability of the Directors.
7. That rights acquired under a temporary Statute are permanent and continue, notwithstanding the expiration of the law under which they were acquired, and that the liability of the Directors continued.
8. That neither the debts of the Bank, nor the liability of these Directors, were extinguished by the expiration of the charter.
9. That the liability of the Directors would not be affected, even if the debt was extinguished as to the Bank.
10. That the deed of assignment and saving in the Acts of 1842 and 1843 would have saved the debts and liabilities

- from extinguishment or destruction, even if that rule was in force. *Hargrove, Ex'r, vs. Chambers, et al.*..... 530
2. Where a bill-holder sues the assignee of a Bank upon its notes, and no plea of *non est factum* is filed, the plaintiff need not prove the execution of the Bills.
Bethune vs. Dougherty..... 770
3. The Chattahoochee Railroad & Banking Company made an assignment, in 1841, to Van Leonard, W. P. Yonge, and John Bethune, of its effects, to collect and pay its debts. There is no evidence that Van Leonard ever accepted the trust. There is proof that the other two did. In December, 1843, the Legislature passed an Act, in which it is recited that an assignment had been made by said Railroad & Banking Company, to John Bethune, and confirming and making valid said assignment for all purposes, both in Law and Equity; and declaring that said assignee might sue and be sued in his said character of assignee for any demand due to and from said Banking institution. *Held*, That said Act is constitutional and valid, and that the subsequent renunciation by John Bethune, in December, 1844, of this legislative ratification of his appointment by the Bank, does not discharge him from liability. *Ibid.*
4. Where a Common Law remedy is given to enforce an equitable right, to which the Statute of Limitations cannot be pleaded, it cannot be pleaded to the proceeding at Law.
Ibid.

BILL OF EXCEPTIONS.

1. The bill of exceptions must affirmatively disclose the error assigned. *Doebler vs. Waters*..... 344
2. When an application is made for a new trial and refused by the Court, a certificate by the presiding Judge to this fact does not amount to a certificate as to the truth of the grounds upon which the motion was made. It may be that the rule was denied, because the statements embodied in it were not in accordance with the facts which transpired in the cause. *McClane & West vs. Densmore & Kyle*..... 724
4. A writ of error will be dismissed unless prosecuted by the plaintiff in error at the term to which it is returnable by Law, or there be Providential cause for the failure; and the

term to which it is returnable by Law is the first which occurs after the bill of exceptions is filed in the Clerk's office below, unless such first term opens before the expiration of fifteen days from such filing. *Bryan vs. Walton*..... 334

BOOKS OF ACCOUNTS.

See Action, 5.

BRIEF OF EVIDENCE.

See Practice, 8, 9, 11.

CAPIAS AD SATISFACIENDUM.

See Jail Fees

CERTIORARI.

1. In order to obtain a *certiorari* from a Justice's Court, the facts stated in the petition need not be verified by affidavit. *Ware vs. Craven*..... 35

CHARGE OF THE COURT.

1. The Court should always, upon request, charge the Jury specially as to any fact relied on by either party, that is true and material, so as the Jury may be advised by the Court of its legal effect and application to the issue they are trying. *Chastain & Luck vs. Robinson et al.*..... 55
2. When a legal charge is requested upon the main point in a case, but is unintentionally omitted by the Judge, and not suggested by counsel, when called on at the end of the general charge to suggest omitted points, a new trial ought to be granted. *Adair et al. vs. Adair*..... 102
3. Where the charge of the Court is calculated to prevent the Jury from giving to any portion of the testimony proper consideration, and the party may thereby have been injured, a new trial will be granted. *Glass & Blalock vs. Cook*... 123
4. Although a charge be literally correct, still, if the language was calculated to mislead the Jury upon a material point, a new trial may be awarded. *Smith and wife vs. Orrery*... 241

charge not warranted by fact is erroneous. *Cain vs. Newell*..... 271

error in the Court to charge the Jury, "that there is conflict in the evidence," when that is denied, it being for Jury to determine whether there is in fact a conflict. *McKee and wife et al. vs. Thornton*..... 361

when there is an apparent conflict between the testimony of one witness and two others, it is error to charge, that the Jury are to consider from the evidence whether the two are not mistaken, thus discriminating against the two, especially when the testimony is of the same character and alike attached on the record. *Ibid.*

error in the Court, in the charge, to give an undue and incorrect weight to a portion of the evidence, and which is exclusion of other parts equally important. *Ibid.*

error in the Court to charge the Jury in a criminal case that the defense, if successful, would, in his judgment, be based on the violation of a solemn oath they had taken, and that the defendant is "constrained to warn them, that to acquit a prisoner on such a ground, that ignorance of the existence of a fact is a good excuse for its violation," would be a violation of their oaths as Jurors. *Dickens vs. The State*..... 383

error in the Court to charge the Jury on a state of facts not warranted by the evidence. *Cain vs. Busby et al.* 714

though the charge excepted to is evidently a mistake, and it stands in the record as the act of the Court, and erroneous, such error must be corrected. *Ibid.*

improbable charge, which has an injurious tendency, *Water Lot Co. vs. Jones*..... 944

in carriages and harness were bought in Columbus by McKee & Roberts, whether by Livingston or Brady, and some conflict in the testimony. Livingston gave evidence in payment, with a stipulation upon its face that the property of Dr. Wardlaw might be substituted for his, Livingston's. The decided weight of proof is, that Livingston bought the trade, and that the vendors looked to him for payment. McKee & Roberts sue Brady in assumpsit for the money: *Held*—1. That the Court erred in re-

fusing to charge as requested, that the fact that the vendors took the note of Livingston at the time of the sale for the purchase money, was *prima facie* evidence that the credit was given to him; and in adding a qualification that had nothing to do with the legal principle contained in the request, namely: "provided the note was absolute upon its face, and nothing further to be done by the parties thereto; the only condition being the stipulation that Livingston might substitute Dr. Wardlaw's note for his. 2. In charging that the payment by a promissory note on an insolvent person was no payment at all, the proof showing that the payment was not by Brady, the defendant, in Livingston's note, but by Livingston in his own note: *Held*, That the remedy, if there was any against Brady, was to charge him upon the fraud in the transaction, and not upon the contract of sale. *Brady vs. McKee & Roberts*..... 748

See Criminal Law, 16.

CHILDREN.

See Wills, 3.

CITY ORDINANCES.

1. A party summoned to answer for an offence committed against one ordinance, cannot be proceeded against and punished by another and a different ordinance.
Lesterjelle vs. City Council of Columbus..... 936

CLAIMS AND CLAIM LAWS.

1. The interest which will support a claim under our Statute, is any interest which renders the property not subject to the levying *fi. fa.* or attachment, or which is inconsistent with the plaintiff's right to proceed in selling the property. *Wade & Co. vs. Hamilton et al.*..... 450
2. When goods are attached and claimed, and the proof submitted by plaintiff, on the trial of the issue, is slight as to title, evidence that the goods, at the time of the levy, were in the possession of claimant, and not of defendant, is proper to be considered by the Jury on the question of title.
Shultz et al. vs. Watkins, et al...... 622

See Equity, 5; *Mortgages*, 4.

CLERK OF SUPERIOR COURT.

e Clerk is not entitled to a fee of one dollar in advance entering a case on the motion docket.

ll vs. Duncan..... 938

COMMON CARRIER.

en Cotton is to be transported through the medium of common carriers, connecting with one another, it is the y of him who performs his part of the transportation , to deliver it to his successor, by at least placing it re it is easily accessible to him; but while the first can discharge himself by a less delivery than this, the next bind himself by accepting a less.

in Dray Line Company vs. Hurt..... 798

Delivery.

COMPROMISE.

re parties have conflicting claims depending upon a point, and they *compromise* them, each is bound by the ement, whether the Law point turns out to have been im or against him. *Morris et al. vs. Munroe*..... 630

CONFESSION OF JUDGMENT.

Appeals, 3.

CONFLICT OF JURISDICTION.

Equity, 19.

CONSIDERATION.

omise to pay money is without consideration, and will e enforced when the reason for giving it is not to cover ges resulting from the failure to perform a contract, but vent the failure by a penalty. *Doebler vs. Waters*,... 844

Contracts 6, Evidence 19.

CONTINUANCE.

o ground of continuance, of itself, that a full report
64

of a decision of this Court in the case on trial, has not been received by the party desiring its use.

Walker et al vs. Floyd,..... 237

2. To be entitled to a continuance on account of the absence of a practicing attorney from the Court, the party desiring such witness must show the same diligence to have the attorney in attendance, or to obtain his evidence, as for that of any other witness. *Ibid*.
3. A continuance will be granted in order to give a party an opportunity of compelling a witness in another State to answer interrogatories, even in the absence of knowledge on the part of the Court, as to whether the Laws of such State will furnish the compulsory process or not.
Johnson vs. Baldwin,..... 816
4. A continuance ought not to be granted on the ground of absent evidence, when the opposite party fully admits all that could be proven by the evidence, if present; nor when there is no showing of the proper diligence to have it present. *Baldwin vs. Walden*,..... 829

See Criminal Law, 1.

CONTRACTS.

1. When carpenters agree to do work, according to specifications, in a neat and workman-like manner, and fail, not only to comply with the contract, but do the work unskillfully and negligently, they are liable to respond in damages to the employer, for all injuries resulting from the breach of the contract.
Trustees of Monroe Female University vs. Broadfield et al. 1
2. The fact that the employer accepts the work, and agrees to pay for it according to contract, does not relieve the carpenters from such liability, unless the employer, at the time, knew of the deficiencies, or breach of contract, and expressly agreed to waive his rights under the same, which must affirmatively appear *Ibid*.
3. Where there is a conflict of testimony as to the terms of a contract, and the witnesses are equally credible, neither being present when the contract proven by the other was made, it may be reconciled by supposing, that in the course of the negotiation the terms were changed; and in that event, the last should be enforced. *Hobbs vs. Davis*,..... 423

en a negro is hired to make a crop, and taken away by owner in the middle of the year, whereby the crop is rely lost, the true measure of damages is the hire of the o, the rent of the land, and the expenses incurred for purpose of making the crop. *Ibid.*

en a negro is hired to make a crop of corn, cotton, &c., no time is fixed for the termination of the hiring, it be presumed to be *for* the year. *Ibid.*

ny contract must be founded upon a consideration, either od or valuable, otherwise it is a *nude pact*. If a Plain- n *fi. fa.* has a lien upon property which is sold for \$8,- or is worth that amount, and he agrees to accept of 00, or one-fourth of the amount from the defendant in ation, or the purchaser under him, and release the debt- om his liability upon the judgment debt, the agreement utitious and cannot be enforced. *Molyneaux vs. Collier*, 731

esiding in Florida, contracts to sell and deliver to C. & ouchers in the city of Macon, Georgia, 600 head of cattle, at a stipulated price—200 to be delivered the f June, 200 the first of August, and 200 the first of nber. The first two instalments are delivered and a given in part payment; the plaintiff fails or refuses to r the remaining 200. *Held*, That in a suit by S. upon te given for the cattle, C. & W. may reduce the re- by the amount of damage they sustained on account plaintiffs failure to consummate the contract.
My & Walker vs. Sutton, 875

rows \$1,000 of B., and promises to return it in ten - send B. a note for \$5,000 which he holds on C.— That in the absence of positive proof as to the na- the transaction, it will be construed into a security \$1,000 borrowed, and not an absolute transfer of the note. Equity would relieve against such a contract, factorily proven; the ten days within which the was to be returned, not being of the essence of the ent.
: *Thompson vs. Brown & Carmichael*, 925

“MCINTOSH, February 3d, 1855.

FENDERSON SMITH, ESQ.—SIR: If Henry Weaver purchase any of the negroes of Langford's estate, I o stand his security if he desires it, and will be ta-

ken; and I shall not be present on your sale day, but will attend to it at any time.

Yours respectfully,

[Signed]

SAMPSON BELL."

Weaver having bought property upon the credit of this letter at Langford's sale, and Bell, when called upon, refusing to become his security. *Held*, That the letter was actionable. *Smith vs. Bell*,..... 919

CORPORATIONS.

1. As the Act of incorporation of the Dahlonga Tanning and Leather Company contains a personal liability clause as to stockholders therein, that liability continues, notwithstanding a transfer of the stock, unless the stockholder so transferring, shall discharge himself from liability, by a compliance with the provisions of 2d section of the Act of 29th December, 1838. *Mason & Field vs. Force Brothers & Co.* 99
2. When a Judgment is properly rendered against that incorporation, and execution legally issued, the same may be levied upon and collected out of the private property of any of the stockholders therein. No service of process upon, or notice of, the suit to the stockholders being required by that Act, or necessary. *Ibid*.

See Action 8.

CRIMINAL CONVERSATION.

1. "It is not always necessary that the husband be proved to have connived at the particular acts of adultery charged. For if he suffers his wife to live as a prostitute, and criminal intercourse with a third person ensues, he can have no action. It is *damnum absque injuria*." *Cook vs. Wood*.... 891
2. "Passive sufferance, or connivance of the husband, may also be shown in bar of a civil action. *Ibid*."
3. "It is not necessary to show connivance at actual adultery any more than it is necessary to prove an actual and specific act of adultery. *Ibid*."

COST.

1. It is error to tax the defendant with the entire costs of a proceeding to dissolve an injunction. *Mayor and Council of Columbus vs. Jaques et al*,..... 546

COURT OF ORDINARY.

order granting leave to sell the land of a testator, granted by the Court of Ordinary upon the application of the administrator with the Will annexed, is valid, whether based on legal reason or without reason; and a sale under passes the title of the testator.

c, ex dem Sikes vs. Roe et al.,..... 961

Administrators, 4.

COVENANT.

The Water Lot Company sold to Van Leonard, in trust for Howard Manufacturing Company, a water lot, No. 11, which were various covenants. In one place, in one of deeds between the parties, Van Leonard was styled trustee of the Howard Manufacturing Company; in another, trustee of the stockholders of the Howard Manufacturing Company. In the deeds there were various covenants; among others, after stipulating how the canal or reservoir to be finished, the waste-way not being considered sufficiently deep to carry off the waste water from the machinery, the Water Lot Company agreed to blast out the waste-opposite to lots 13, 14, 15, the Howard Manufacturing Company to blast out opposite 11 and 12, all being below 11, which the Howard Manufacturing Company intended to put machinery. There was this further stipulation:—

the Water Lot Company would “so finish all the eyes of the canal or reservoir as to furnish and contain in said canal, water in sufficient quantity to propel the machinery used and erected on lot No. 11, by Leonard.” After erection of buildings, &c., on the lot, the whole property was sold at Sheriff's sale, as the property of the Howard Manufacturing Company. On an action brought by the Howard Manufacturing Company for breach of covenant and injury sustained by the Howard Manufacturing Company prior to sale, one Parr, who held an interest in the property at the time the purchaser at such sale was offered as a witness.

Parr was not interested in the result of that suit, and was silent.

the styling of Van Leonard in the one as trustee for Howard Manufacturing Company, and in the other as trustee for stockholders of the Howard Manufacturing Company was immaterial, and explained itself.

3. That the Water Lot Company did not covenant to supply low water, or to supply the machinery with water at all events, but the parties contracted on the basis, that if all the covenants were performed as stipulated, in regard to canal, waste-way and eyes, that a sufficiency of water would be supplied.
4. That the mutual covenants as to blasting and blowing out the race or waste-way, were independent, and not dependent, they going to a part, and not the whole of the consideration.
5. That the measure of damages was the interest on the investment for the time the machinery was not employed for want of water; and in case only a part of the machinery was idle, interest on a like proportion of the investment.
6. That the plaintiff is not compelled to expose himself to a trespass to protect the defendant from the consequence of his breach of the contract.
7. When the verdict is sustained by the proof, the case will not be sent back for an immaterial error in the charge of the Court. *Water Lot Company vs. Leonard*,..... 560

CRIMINAL LAW.

1. Where the Court refuses a continuance in a Capital Case, on account of the absence of testimony, material for the prisoner's defence, a New Trial will be granted.
Whitworth vs. The State,..... 10
2. A riot cannot be committed without as many as two persons acting in execution of a common intent.
Prince and Stafford vs. The State,..... 27
3. If, upon a sudden quarrel, the parties fight upon the spot, or presently agree and fetch their weapons and fight, and one of them is killed, such killing is but Voluntary Manslaughter, no matter who strikes the first blow.
Gann vs. The State,..... 67
4. Whenever the homicide is the result of that sudden and violent heat of passion, which is supposed to be irresistible, and without any malice or deliberation, the killing is Voluntary Manslaughter, and not Murder. *Ibid.*
5. On an indictment for malicious mischief in shooting a mule, it is a good defence to show that the shooting was done with the motive of protecting the crop of the accused, and not from either ill-will to the owner or cruelty to the animal;

It is the line of this defence to show, that the mule was the corn-field of the accused at the time of the shooting; the evidence showing him to have been there is corroborated by proof that he had an habitual proclivity towards mischief, and was hard to restrain from it.

Right vs. The State,..... 325

The right of the Jury in a criminal case to judge of the facts, being secured by Statute, must not be impaired by decision of the Court, that if they do so and acquit the offender, they would violate their oaths as Jurors.

Kens vs. The State,..... 388

The opinion of a spectator, expressed just before the commencement of a fight, that one of the parties had a malicious intent towards the other, is not legal evidence that such an intent existed. *Fundy vs. The State*, 400

A Policeman or Watchman under city ordinances, is as much under the protection of the Law in making an arrest as any public officer, such as Sheriff, Bailiff or Constable.

Wason, alias Thompson, vs. The State, 426

An officer is not necessarily a trespasser in making an arrest on probable ground of suspicion, and without a warrant.

Although the arrest of one accused or suspected, should be legal, or a search of his property or person by the officer should be unauthorized, this would not justify the accused in shooting the officer, not to prevent such arrest or search, after the arrest had been made, and the search voluntarily submitted to or tendered. *Ibid.*

When the defence relied on for shooting at an officer is, that the arrest was illegal and unauthorized, any fact, circumstances, or information on which the officer acted in making the arrest, is admissible, not as proof of the facts, but to show that the officer, in making the arrest, did so on probable ground of suspicion. *Ibid.*

A person cannot be tried and convicted for an offence different from that for which he is prosecuted or called upon to answer. *Mayor and Council of Columbus vs. Arnold*,..... 517

A person who has agreed to participate in a crime may repent.

Arnold vs. The State,..... 757

14. One need not be present at the commission of an offence to make him principal. *Ibid.*
15. If the Jury cannot conscientiously adopt the Law as it is given to them in charge by the Court, it is not only their right, but their duty, to render a verdict according to the opinion which *they* entertain of the Law; and they should be so instructed by the Court when requested to do so.
McDaniel, alias Hickey, vs. The State,..... 853
16. It is error, in giving the Law of reasonable doubts, for the Judge to tell the Jury, that reasonable doubts usually arise from either want of evidence or conflict of evidence, in a case where the doubt did not arise from either of those causes, but turned solely upon the internal credibility of an explanation which the defendant had given of the circumstances against him, when they were first brought to his notice. *McElven vs. The State*,..... 869
- See City Ordinances.*

DAMAGES.

1. Pecuniary injury is not the only one for which compensation ought to be allowed in damages. *Cocper vs. Mullins*,... 146
2. The doctrine of damages discussed.
Smith and Wife vs. Overby,..... 241
3. A case in which the damages for a frivolous appeal were held to be excessive. *Hull vs. Tommy*,....., 762
4. Where the landlord makes successive attempts to stop a leak, but fails through defective workmanship, he must pay the tenant, under such a contract, full compensation for the injury done to goods in the house during the period of those attempts and failures. *Dempsey vs. Hertzfeld*,..... 866
5. The rule of damages for a false representation is, that there must be a deduction from the agreed price, in proportion to the article's departure from the representation made of it.
Gaulden vs. Shehee,..... 948
- See Covenant; Set-off, & Warranty, 2.*

DEBTOR and CREDITOR.

creditor holding a debt against a principal and deceased
 ety, is under no *duty* to give notice of the existence of
 debt to the administrator of the surety. He must give
 ce when he seeks to hold the administrator personally
 le for a wrong application of the assets to other claims,
 need not do so in order to hold the estate liable for the
Goodwyn vs. Hightower,..... 249

ettlement in favor of wife and children, or either, will
 ported, if made in good faith and with no intent to
 and creditors; but one, by a debtor in greatly embar-
 d circumstances, of the bulk of his estate, leaving but
 tance, and insufficient for the debts, cannot be supported.
ton vs. Brown,..... 490

re a creditor agrees to accept from an insolvent debtor
 sum for a greater, to be paid in personal service, (in-
 of property) or the debt of a third person, it is a val-
 ntract; *aliter*, if the debtor was solvent
neaux vs. Collier,..... 731

DECEIT.

presentation that a person may be safely credited, can
 ive a right of action, without some indication in the
 entation, or its circumstances, of the extent to which
 edit may go. *Glover vs. Townsend, Crane & Co.*,..... 90

resentation by the seller of a horse, that a sore on the
 s eye was caused by a mule bite, is not so overcome by
 opinions to the contrary, founded on the appearance of
 re, as to require a Jury to find that the representation
 lse. *Benson vs. Griffin*,..... 106

DEEDS.

d made since 1839, and attested by a Justice of the
 is not admissible in evidence, upon the fact of its
 been recorded without other proof
vs. McKinney and Whitlow,..... 83

l between private persons conveying all the land on
 e of a river not navigable, conveys all that lies on
 de, beginning from the middle of the river; or in

other words, the term river, when applied to streams not navigable, and used to designate a boundary between private land owners, means in Law the middle of the river.

Stanford vs. Mangin et al.,..... 355

3. Possession of a deed by grantee, or one taking interest under it, is presumptive evidence of its delivery in immediate execution of the purposes for which it was made.

Black and Wife et al vs. Thornton,..... 361

4. Under our Registry Laws, a copy-deed is not evidence, unless the original appears to have been properly admitted to record. *Oliver et al vs. Persons*,..... 391

5. Under the Act of 1856, a *prima facie* presumption in favor of proper probate is raised, where the records have been burnt. But this may be rebutted, and the Judge may hear evidence in rebuttal before admitting the copy as secondary evidence. *Ibid.*

6. Proof of the existence and execution of an original deed must be made before a copy thereof can be used as evidence.

Durham vs. Holman,..... 619

7. When a deed is put in evidence purporting to have the name of one subscribed thereto as Justice of the Peace, as a subscribing witness, and a certificate from the Executive Department shows, that no such person was Justice of the Peace in the county when the deed purports to have been executed, at that time, such proof, in the absence of rebutting evidence, is conclusive evidence of the forgery of the paper, and the fact cannot be weakened by a supposition. *Ibid.*

8. There is no delivery of a deed, when the grantor never parts with the dominion over the paper, but retains it, concealing its existence from the grantees, and intending not to put it into their custody or control.

Rutledge vs. Montgomery et al.,..... 809

DELIVERY.

1. A delivery of cotton to a common carrier for a consignee, and its acceptance by the carrier for the consignee, when there was a previous agreement between the consignee and

signor, that the latter should send the cotton to the foreign, is a delivery to the consignee.

C. Wade & Co., vs. Hamilton et al.,..... 450

Deeds 3, 8. Gift.

DEVISE AND LEGACY.

testator, by the 11th item of his Will, gave to his son Thomas, who was a minor, a negro boy named Clark, at \$100, and other property at stated prices, and money, making the whole \$2,384, as stated in the item. By another, the 12th item, it was provided: "In the event that any of the goods herein given to any of my minor children should be lost or become of little or no value before such minor be of lawful age, then, and in that case, it is my desire, that such deficiency or loss be made up to such child or children so losing, out of my estate." Clark died before he came of age, and at the time of his death was worth \$100. *Held*, That the sum to be paid to Thomas in lieu of \$100, at which he was priced in the Will, and not his actual value. *Oglesby et al vs. Oglesby,*..... 348

Legacy to "be divided between my two sisters' children, both Joice, and Martha Lilly, to-wit:" naming the children, goes only to those who were children of the two sisters, at the death of the testator, and one of the named children dying before the testator, is to be considered as taken from the enumeration.

Myer et al vs. Congleton,..... 976

DISCOVERY AT LAW.

Evidence 20.

DISTRIBUTION.

testator having two sets of children, made a division of his estate into as many shares as he had children, and gave to each of the older set an equal share of the same. If they were receipted to him for the same, as in full, of distributive shares in his estate. The balance left was to be set apart for the younger set of children. After the death, on a bill filed by the administrator for instruction. That the disposition so made of the estate, and agreed

to by the older children, was good, and excluded them from any interest in the estate of the deceased.

Newsome et al vs. Cogburn,..... 291

See Devise and Legacy.

DIVORCE.

1. As to a suit for divorce, the wife is *sui juris*, and may charge the husband without his consent with the real value of all such services of other persons as may be necessary to her in the conduct of the suit. *Sprayberry vs. Merk*,..... 81

DOWER.

1. The administrator of deceased alone, can contest the widow's right to dower, in an application by her for assignment of dower. *Findley vs. Lawless*,..... 88

DRAFTS AND BILLS OF EXCHANGE.

1. The drawer is not discharged from his liability on a draft on the ground that the holder did not present it for acceptance or payment at the proper time, unless he is injured thereby. *Patten vs. Newell*,..... 271
2. Parol evidence is incompetent to prove, that a draft payable to the order of P., generally, was intended to be negotiated at Bank. *Ibid.*
3. Blank acceptances are binding upon the acceptor, there being no complaint that the drafts were not filled out according to the agreement of the parties. *Moiese vs. Knapp*,..... 942

EJECTMENT.

1. A plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of the defendant's title. *Stanford vs. Mangin et al.*,..... 355
2. Where the proof shows, that the defendant in an action of ejectment was in possession of the lot of land in suit, the year before suit was brought and after the suit was brought, this is sufficient evidence of possession of the premises to authorize a recovery against him. *Doe ex dem. Hooper vs. Roe et al.*, 553

when land was drawn by, and granted to W. H.'s orphans, and there be a demise in plaintiff's declaration from them, and the grant is in evidence with proof of possession by defendant, and no adverse title is relied on by defendant, the plaintiff is entitled to a verdict. *Ibid.*

the fact that the deed from the drawers of the lot to the plaintiff's lessor does not contain the number of the district, the land being otherwise sufficiently described, or the date the month of the execution of the deed is left blank, or that the deed was not recorded in time, or that the drawers were swindled out of the land, do not affect the plaintiff's right to recover as against a mere wrongful holder, there being no other deed from the drawers; and so the court ought to instruct the Jury. *Ibid.*

a recovery can be had in ejectment when the lease under which the alleged trespass was committed, has expired before the trial. *Roe & Riley vs. Doe ex dem. Adams,*..... 608

where the verdict of the Jury in ejectment is too uncertain to enable the Court to award judgment upon it, it is reversed. *Ibid.*

in an action of ejectment, when the title is brought down to two persons, and the defendant offers a deed from one of two for half of the land, that deed is admissible as evidence to protect the defendant holding under such deed from an eviction.

Calhoun vs. Doe ex dem. Johnson et al.,..... 611

a plaintiff, in an action of ejectment, is not entitled to recover when one of the lessors has conveyed, by deed, his legal and equitable right to another lessor whose right to recover has been barred by a former recovery in the same form of action against the same defendant for same land, and the demises from these two being all the titles exhibited by the plaintiff.

ex dem. Dearmond vs. Roe & Brooking,.... 632

a recovery of prior possession of land for more than seven years is sufficient to authorize a recovery by a plaintiff in ejectment against a mere wrong-doer. *Buckner vs. Chambliss,*.. 652

titles of the different lessors of the plaintiff in ejectment are different causes of action, and for purposes of de-

fense, the action, as to each one of them, is to be considered as commenced when that one is introduced into the declaration, whether it be introduced at the beginning or as an amendment afterwards.

Roe & Tidd vs. Doe ex dem. Pearce, 873

EQUITY.

1. This Court will not interfere with the discretion of the Circuit Judge, in refusing to dissolve an injunction, unless the discretion is manifestly abused. *Cash et al. vs. Williams*,. 20
2. An injunction will not be dissolved on the coming in of the answer, unless the answer fully swears off or denies all the equities of the bill, especially when the injunction is necessary to protect the complainant from an invasion or trespass upon his property.
McGinnis vs. The Justices of Inferior Court, 47
3. Where a general demurrer has been heard and adjudicated, the Court will not, on a motion subsequently made to dissolve the injunction on the coming in of the answer, consider any objection to the bill that was properly involved in the demurrer. *Ibid*.
4. A Court of Equity will enjoin an Administrator from recovering a tract of land when the intestate has been dead more than seven years, and the heir at Law was of age at the death of intestate, and when there are no debts against the estate, and the defendant has been in adverse possession for seven years before commencement of suit or grant of administration. *Murdock vs. Mitchell*, 74
5. Where lands are levied on by execution, and claims interposed and withdrawn by successive claimants to whom the property is conveyed, a Court of Equity will interfere and restrain the claimant from withdrawing his claim, and the holder of the title from transferring the same, until the question as to its liability to the lien, can be adjudicated.
Field vs. Ralston & Martin, 79
6. Equity will decree the whole performance of an agreement which is within the Statute of Frauds, whenever there has been such a part performance as that the whole performance is necessary to prevent a fraud; and the whole performance is necessary to prevent a fraud in a case where the parties

have proceeded so far on the faith of the agreement, that they can not be restored to their *statu quo*, nor adequately compensated in damages, by avoiding the agreement and leaving them to their action for damages.

Chastain vs. Smith et al.,..... 96

7. The answer of a defendant, denying the execution of a promissory note, when responsive to the bill, can be overcome only by two witnesses, or one witness aided by corroborating circumstances. *Low vs. Argrove and Wife et al.*,... 129

8. If a wife, by bill, sets up an ante-nuptial agreement by parol for the settlement of property, which is admitted by the husband, and the Statute of Frauds is not insisted upon, Equity will decree a specific performance.
Kirksey vs. Kirksey,..... 156

9. When a bill is presented to the Judge, praying an injunction, and it appears upon its face that the complainant has ample redress at Law; and especially if the statements are inconsistent and contradictory, it is the duty of the Judge to refuse his sanction. *Camp vs. Mattheson & O'Harra*,.. 170

10. That relief will be granted from a mistake as to the legal effect of an instrument, is Law, settled by adjudications of this Court and by Statute, and the evidence shows such a mistake in the verdict in this case. *Lucas et al. vs. Lucas*, 191

11. A verdict and judgment was obtained at Common Law for the defendant, in a statutory form of action, for a lot of land The Statute of Limitations having been relied on and supported in the trial by a deed ante-dated eighty years, without which the recovery could not have been had, one of the witnesses to the deed swearing that the deed was made at its apparent date. A bill was filed by the plaintiff to restrain the defendant from using such judgment so fraudulently obtained as a bar to a subsequent action for the same lot. *Held—*

1. That it was not necessary to allege in the bill, or prove that the witness, swearing falsely, had been prosecuted to conviction for perjury, under the provision of 8th sec. 8th div *Penal Code*; that the case did not fall within its provision, nor was affected by it.

2. That although the bill showed that defendant had been in actual possession of a part of the lot more than seven years before the commencement of the suit, still, the verdict on the entire lot could not be maintained without the deed.

3. That a Court of Equity will grant relief against a judgment obtained by fraud, as the judgment in this case was.
4. In matters of fraud, the party aggrieved has a right to go into either a Court of Equity or Law for relief, and having gone into Equity, he cannot be sent back to a Court of Law, although his remedy there might be equally adequate.
5. Injunction is a proper remedy to stay waste in cutting down and selling from the lot the valuable timber thereof.
Griffin vs. Sketoe,..... 300
11. The bill of a married woman, relative to her separate estate, may be dismissed by her, against the wish of her next friend. *Browner vs. Bell*,..... 334
12. When the defendant in execution remains in the possession of the land, under some parol agreement with the purchaser as to its redemption, makes valuable improvements thereon, and the purchaser acknowledges himself satisfied as to the manner in which the re-payment has been arranged, the tenant acquires a complete Equity to the premises, and one upon which he may rely to protect his possession against an action brought by the purchasers.
Vanduzer vs. Christian,..... 336
13. The defendant in every Equity cause may deny on oath the execution of any document exhibited to the bill, and thus put the complainant on proof.
Oliver et al vs. Persons, 391
14. On a bill filed for the recovery of a negro, and the only evidence of title relied on by complainant was a deed from one Tinsly, reciting on its face that he had conveyed said negro previously to another person. Held, That the plaintiff had no right to recover, and the bill was properly ordered to be dismissed. *Griggs vs. Daniel*,.... 500
15. Where an agent receives money for his principal upon an illegal contract, he cannot avail himself of that defence in an action brought against him by the principal for money had and received to the plaintiff's use, especially when those who paid over the money to the agent, do not desire that he should retain it. *Ingram vs. Mitchell*,..... 547
16. When money is actually paid over upon an illegal contract, it is clear that it cannot be recovered back, the contract being executed, and both parties being in *pari delicto*.
Ibid.

A party may, in some cases, be allowed to retain money which was due to him *ex equo et bono*, but which he could not have recovered at Law; yet, he never can be allowed to retain money to which he has no claim whatever against the true owner. *Ibid.*

As to the distinction in some of the cases, resulting from the knowledge or ignorance of the agent, as to the illegality of the contract upon which the money was paid, that can make no difference. *Ibid.*

In the exercise of the jurisdiction, confided respectively to the State Courts and those Courts of the United States, where the latter have not appellate jurisdiction,) it is held, that neither can have any right to interfere with, or control the operations of the other. It accordingly has been held, that no State Court can issue an injunction upon the judgment in a Court of the United States, the latter retaining an exclusive authority over its own judgments and proceedings. *Strosier, next friend, vs. Howes, Hyatt & Co.* 578

When a decree is rendered on a bill filed by two complainants, one of whom was dead at and before the filing of that bill, or rendition of the decree, that fact only vacates the decree as to the deceased complainant. *See et al. vs. Rowell et al.,*..... 764

Under the 9th Equity Rule, an injunction to restrain a common Law action ought not to be granted, unless the application is made thirty days before the trial term of the court, or a good reason given for the delay. *See et al. vs. Taylor vs. Brown & Carmichael,*..... 806

There is no equity in a Bill which asks the injunction of a common Law action upon the grounds: 1st, That the complainants do not owe the debt on which the pending suit is founded. 2d. That the defendants, by suing out garnishment against a person who held assets of the complainants, prevented the complainants from paying their debts.

A Bill of Review will not be sustained when it does not ask for a case which requires a reversal of the former decree, which would authorize a new trial. *Jones vs. Robeson,* 826

On all the material allegations in a Bill, and the state-

- ments upon which the Equity of the Bill is based, are fully met and denied by the answer, and there is no special reason for retaining the injunction, it will be dissolved.
Howard et al. vs. Marine Bank of Georgia, 841
25. An execution creditor can not be enjoined from the sale of his debtor's property upon the ground, that there are claims to it which will cause it to go off at a reduced price.
Robinson vs. Thompson & Co., 933
26. A bill which alleges that a lot of land, of which the complainant was the true owner, was sold through misapprehension by the Sheriff, the complainant offering to repair all the consequences of the mistake to the purchaser, and which alleges that the Sheriff, at the instance of the purchaser, is about to turn the complainant out of possession, is a good Bill, and ought to be retained for the equitable relief of injunction and cancellation.
Mustian vs. Jones & Brooks, 951
27. Equity will grant relief from an endorsement which, through mistake as to the legal effect of the words used, binds the endorser to pay the note, when the true contract and intention was to write only such an endorsement as would convey the title without rendering the endorser liable.
Clayton vs. Bussey & Ferrer, 946
28. When to an Equity charged in a Bill, the defendant only interposes a denial upon his information and belief, the injunction will not be dissolved. *Ketchens vs. Howard*, 931
29. An injunction will be totally, or partially, dissolved according to the exigencies of the case. *Ibid.*
30. An injunction must be dissolved when the answers swear off all the equity of the Bill. *Applewhite vs. Baldwin et al.* 915
31. Where the mortgagor of land has no title to the land, but only a bargain for it, with part payment of the purchase money, the mortgagee cannot have the aid of a Court of Equity to foreclose his mortgage as against the holder of the title, without offering to pay the remainder of the purchase money.
Crummey et al. vs. Mechanics & Savings Bank, 670
32. A Court of Equity will not only relieve against a contract

ended in fraud, that is, a suppression of the truth, or a suggestion of falsehood, but also where both parties honestly labor under a mistake or misapprehension of the facts. *Polyncaux vs. Collier*, 731

A complainant coming into Equity, seeking to be discharged from the payment of a just debt, must make it appear that his claim is not against honor and conscience. *Ibid.*

One C., alleging himself to be trustee for S. L. and her children, petitioned the Judge of the Superior Court, alleging that one S. H., an Attorney of that Court, had in his hands the sum of \$3,300, to which he, as trustee, claimed title. The attorney answered, &c. *Held*, That the petition was properly dismissed. The applicant, not averring that the attorney had collected or held the money as agent or attorney, or by what right he claimed the money or possession thereof. That the remedy was by Bill in Equity. *Chappell trustee, vs. Hawkins*, 758

Nuisances 2.

ERROR.

Is no error in the Court to refuse to charge a principle of law, however sound, unless such principle has some application to the case on trial. *Chell vs. Western & Atlantic Railroad*, 22

Proposition to which the Judge expresses his assent during the argument to the Jury, and in their hearing, conveys Judge's opinion to the Jury as effectually as a formal charge could do, and may equally serve as a foundation for assignment of error. *Glover vs. Townsend, Crane & Co.* 90

On the trial of one for an assault with the intent to murder, no error in the Court to refuse to charge the Jury, that they believed, from the evidence, that the prosecution was unfounded, that they should not only find the defendant not guilty, but that they should return the prosecution intended or malicious. *Milner vs. the State*, 137

Whether is it error in refusing such request for the Court, in response thereto, to remark, "that there was no evidence warrant the charge, when such is the fact. *Ibid.*

5. No amount of errors will send a case back for a rehearing, when a different verdict could not stand for want of evidence to support it. Errors in such a case are immaterial. *Rouse vs. Ware*,..... 378
- 6. It is a violation of the Act of 1850, making it unlawful for the Judge to express, or intimate to the Jury, what has, or has not been proved, to charge them that they should find for the plaintiff the amount which he claims, if they believe the witnesses who testified in the case. *Jarrett vs. Arnold*,..... 323
7. It is not error in the Court to state a principle or fact to the Jury in his charge which is wholly immaterial, and which does not affect, in any way, any defense of the accused. *Johnson, alias Thompson, vs. The State*,..... 426
8. It is not error in the Court to state a fact, as a fact, to the Jury, which is admitted by counsel in defence, and on which there is no issue. *Ibid.*
9. However erroneous a proceeding may be, still, if it results rightly, and will be a bar to any future litigation, it will not be disturbed. *Thompkins vs. Female College*,..... 485
10. On a motion to dissolve an injunction, it is error in the Court to tax the defendant upon the refusal of such motion with the whole costs of the proceeding. *Mayor & Council of Columbus vs. Jaques et al.*,..... 506
11. Where illegal evidence has been admitted, it is error to make such illegal evidence the basis of a direction for the finding of the Jury. *Durham vs. Holman*,..... 619
12. It is not error to grant a *rule nisi* for a new trial. *Spence vs. Holman*,..... 646
13. It is not error in the Court to refuse an injunction of executions on such facts alleged in the bill as would not constitute a defence to the original suit on which the judgments were had, from which the executions issued. *Dawson et al. vs. Merchants & Planters' Bank*,..... 664
14. A writ of error does not lie from a decision of the Judge of the Superior Court on a question referred to his decision, and which does not come before him in the due course of proceedings at Law. *Waters vs. McNabb, et al.*,..... 672

Where a defendant in *fi. fa.* has deliberately, and repeatedly, verbally and in writing, recognized the debt as good and subsisting, and promised to pay it, it is error in the court to assume that these admissions and declarations were made by the defendant in ignorance of his rights, for the purpose of reconciling his conduct with the contract which he now seeks to set up in his discharge; on the contrary, they rather tend to prove that no such contract was ever entered into, or at least, that the defendant did not understand it as releasing him from liability.

Slyneaux vs. Collier,..... 731

Charge of the Court, 5 to 13.

ESTATES TAIL.

Limitations of Estates, 1, 6, 7, 9.

EVIDENCE.

claim, reduced by payments, to the jurisdiction of a Justice's Court, may be proved in that Court by the oath of plaintiff. *Nichols vs. McAbee*,..... 4

McD. applied to S. McG. to become his surety on a note to M. & Co., not naming the amount. McG. replied by writing, authorizing McD. to sign his name to such note as he pleased. To a suit brought on the note, McG. pleaded *non factum*. On the trial of the issue, it was proper to allow the note to be read to the Jury, upon proof of a conversation between McD. and McG., in which the latter admitted signing the letter before mentioned, and also that McD. was in his permission in the constant habit of signing his G.'s name as security for him (McD.) whenever he was to do so.

Winnis vs. Chamberlain, Miller & Co.,..... 32

Case in which the verdict was supported by the evidence.

Craven vs. Craven,..... 35

That which was said and done by the Justice of the Peace, at a Justice's Court, when a levy of property was advertised for under executions, is inadmissible, on the trial of a case for other property levied on by the same *fi. fas.*, for the purpose of accounting for a proper disposition of such property, or for any other purpose.

Wain & Luck vs. Robinson et al.,..... 55

5. The declarations or statements of one who is no party to the record, and who in no other way appears to be a party in interest, is not competent evidence to affect the rights or interests of the plaintiffs, or parties before the Court. *Ibid.*
6. In order to prove Statute or customary Law, it is not competent for a witness to testify simply, that such is the one or the other. There is higher evidence to substantiate both. *Leonard vs. Peeples*,..... 61
7. If a party act as the agent of another, and not as an Attorney at Law, his testimony is not objectionable; and if he be made a codefendant to a Bill with his principal, and die, the evidence given in by him on a former trial at Law, between the same parties, and concerning the same subject matter, may be testified to. *Jones et al. vs. Kerr & Hope*,. 93
8. Parol proof of the contents of a written contract, cannot go to the Jury without satisfactory preliminary proof to the Court, that the writing was executed and is lost. *Bigelow vs. Young*,..... 121
9. When the question between parties is, What was the state of accounts between them at a particular time? it is error to admit evidence against objection, touching an item which was at that time barred by the Statute of Limitations. *Ibid.*
10. Parol evidence is admissible to explain the purposes for which a note was received, where the receipt is silent as to that point. *King vs. Mitchell*,..... 164
11. In action to recover damages for the killing of a slave, the defendant may give evidence of the slave's character for turbulence and insubordination, for the purpose of aiding the probability of his theory of defence, that the slave was killed in an act of insubordination, and also for the purpose of mitigating the damages; but the evidence must come from witnesses who knew the slave to have had such a disposition, or from admissions of the plaintiff, and not from general reputation, nor from proof of previous particular acts of insubordination on the part of the slave. *Williams vs. Fambro*,..... 232
12. Parol evidence is incompetent to prove that a draft, payable to the order of P. generally, was intended to be negotiated at Bank. *Patten vs. Newell*,..... 271

Parol evidence is admissible in behalf of a surety to prove that to induce him to become surety, the payee of the note assured him that he had in his hands funds of the principal which should go as a credit on the note.
Matthewson et al. vs. Jones,..... 306

It is competent for one who was a Sheriff to state from entries on an execution in his own hand-writing, that the property was pointed out and sold as the property of D. T., when that fact appears by the entry, the witness stating that he invariably stated such facts when so in his entries, and never stated anything but facts therein, although he has no recollection of the facts.
Lock & Wife et al. vs. Thornton,..... 361

In a question between persons, one claiming under a voluntary deed, and the other under a purchase, it is competent to prove what was said by such purchaser and others interested in the sale under whom he claims as to outstanding titles, not as conclusive evidence of want of notice, but parts of the circumstances attending the sale. *Ibid.*

A party having two distinct titles to property may disclaim one and rely entirely on the other, and after such election made, the admissions of his privies in the disclaimed title are not evidence against him. *Oliver et al. vs. Persons*,..... 391

To admit a copy as secondary evidence at Common Law, it is necessary to show: 1. The genuineness of the original. 2. Its loss or destruction; and 3d. That the copy produced is an examined, sworn or true copy. *Ibid.*

Before the testimony of a witness, as to the identity of a hand-writing, can go to the Jury, the witness must express an opinion, one way or the other, at the time when he is testifying, under the circumstances then existing. *Foster vs. Jenkins & Belt*,..... 476

When a written agreement states a consideration in general terms, it is competent to show by parol the particulars included in the general description, in order to show that there has been a failure of consideration and the extent of it. *Lufburrow vs. Henderson*,..... 482

Answers of one of the parties to interrogatories sued out under the Acts of 1847 and 1850, to compel discovery at

Law, are not evidence for such party, unless in response to questions asked. *Clayton vs. Brown*,..... 490

21. Evidence that is relevant cannot be kept from the Jury by a waiver of proof on that point or admission of the fact, if the party desires to have the testimony out. *Ibid*.
22. In a question of *bona fides*, as to a settlement on wife and children by a debtor, proof of debts existing and outstanding against him at the time of the settlement, is proper evidence, and a transcript from the record of a mortgage is competent for that purpose. *Ibid*.
23. When there is a conflict of the evidence, the Jury must so reconcile the whole as to make all speak the truth, if possible. *Durham vs. Holman*,..... 619
24. When the plaintiff's title, or cause of action, is plainly made out, and the defendant relies on a special plea in bar to defeat the recovery, such as the Statute of Limitations, the defendant must establish the facts to sustain the plea affirmatively beyond a reasonable doubt, else the verdict must be against the plea. *Ibid*.
25. That a copy of the advertisement taken from the paper in which the sale was advertised, sworn to be such by the Sheriff, who sold under that order, was admissible as evidence. *Womack et al. vs. White et al.*,..... 696
26. It is illegal for a witness to testify that one made other deeds of gift of all her property among her children. The deeds themselves are the best evidence of the fact, as well as of what they conveyed. *Cain vs. Busby et al.*, 714
27. A defendant who is complicated with others in the commission of a crime, may prove, by the arresting officer, that he put him upon the pursuit by way of raising a presumption of his own innocence. *Pinckard vs. The State*,..... 757
28. A witness cannot be compelled to accuse himself; but where this is necessary to the full understanding of other statements which he has made, the whole ought to be withdrawn. *Ibid*.
29. If a man dies intestate, leaving his wife and daughter his only distributees, the husband of the widow is a competent

ness to testify in a suit at the instance of the daughter
d her husband against the administrator.
Line vs. Redwine & Wife,..... 780

udgments on rules against a Sheriff are admissible in
idence against him and his sureties, in an action on his
ad for failure to pay over moneys so adjudged against
n. *Robinson et al. vs. Towns, Gov., &c.*,..... 818

he Clerk's Execution Docket, made out by himself, or
uty, is admissible in evidence in an action by the ad-
nistrator of the Clerk against the administrator of the
riff, to show *prima facie* the amount of cash due the
rk on cost, *fi. fas.*, and that the *fi. fas.* were delivered
he Sheriff *Ross vs. Davis et al.*, 828

credit upon a note, put there by the maker, affords a
umption that all his cross demands, especially demands
pen account, existing against the holder at that time,
covered by it. *Baldwin vs. Walden*,..... 829

an action for trespass, in beating the plaintiff and tear-
down his house, evidence that the defendant declared,
e committing the trespass, that he was doing it because
plaintiff traded with his negroes, is proper evidence to
mitigation of damages *Gilliam & Berry vs. Love*,... 864

an action by a tenant against a landlord for breach of a
en contract to stop a leak, it is admissible for the ten-
o prove by *parol*, the purpose for which the landlord
r that the house was rented. *Dempsey vs. Hertzfield*,.. 866

Title 2.

EXECUTIONS.

utions issued from a Justices Court against Ward
er and John M. Jordan, jointly, on which appeared
ollowing entry: "Received payment in full on the
n *fi. fa.*, by John M. Jordan, security, January 8,
E. L. Harris, J. P." *Held*, That such entry did
ive the control of the executions to Jordan as surety
st Keeler, the cödefendant, but the same operates as a
action as against each of the defendants, and that a
quent levy and sale of the property of Keeler, under
xecutions, was illegal and void.
as & Carroll vs. Keeler et al., 86

2. Why is not a transfer of an execution by plaintiff's attorney good as an equitable assignment, the plaintiff having received the money paid on the assignment?
Ryan vs. Lieber et al.,..... 433
3. A levy of personal property which has been dismissed by plaintiff or plaintiff's attorney, without being productive, and when no injury has resulted from such dismissal, sufficiently accounts for, and explains such levy to authorize plaintiff to proceed with its collection, and to enable it to participate in the distribution of a fund in Court raised from the sale of the defendant's property according to its priority. *Ibid.*
4. When the plaintiff's affidavit, under the Act of December 11, 1858, preliminary to suing out a *ca. sa.* against the defendant, states that the defendant "has money," &c. *Held*, That, to be a sufficient description of the property to authorize a *ca. sa.* to issue. *Dozier vs. Dozier*,..... 523
5. Executions issued from judgments obtained under the provisions of the Act of 5th March, 1856, entitled "An Act to enable persons who have claims against trust estates, to recover said claims in a Court of Law," must specify the property on which the same is to be levied, or the same will be illegal and void. *Wright vs. Watson*,..... 648
6. The assignment of a judgment and execution conveys away the plaintiff's interest in the further enforcement of it, but not his interest in money which the Sheriff has previously collected on it. *Robinson et al. vs. Towns, Gov., &c.*,..... 818

EXECUTOR.

1. While it is true, that in suing one as executor in his own wrong, you must charge him as executor, generally; still, if the cabalistic gibberish *de son tort* are dropped in all the subsequent proceedings, and the judgment is entered and execution issued against the defendant as executor, it is sufficient. *Shotwell vs. Rowell*,..... 557

EXECUTOR *de son tort*.

See Executor.

EXPERTS.

See Witnesses 2, 4.

FAILURE OF CONSIDERATION.

1. The fact that property is not as valuable as the buyer supposed it was, is no failure of consideration, nor is it any reason why the agreed price thereof should not be paid, in the absence of fraud. *Leonard vs. Peebles*,..... 61

See Reconpmnt.

FALSE REPRESENTATIONS.

See Damages 5; Deceit.

FOREIGN ADMINISTRATORS.

See Administrators 2; Title 3.

FRAUD.

1. Where one misrepresents a fact, knowing it to be false, or asserts a thing to be so, not knowing whether it be true or not, and it proves to be false, he is, in both these cases, guilty of a moral as well as a legal fraud. But where one honestly believes the truth of what he affirms, although it turns out he was mistaken, can he be guilty of a legal fraud (being free from moral turpitude) so as to subject him to liability for the mistake, unless the representations are of a character to amount to a warranty? *Query.*
Leonard vs. Peebles..... 61

2. Because property is not as valuable as the purchaser supposed, is no reason, in the absense of fraud or warranty, for withholding any portion of the price agreed to be paid.
Ibid.

See Equity 11, 32.

STATUTE OF FRAUDS.

1. When one who is Sheriff has been compelled to pay off an execution, and the defendant therein pays a third person to pay the debt, and such third person promises to pay the

- Sheriff the amount he has paid on the execution for the defendant, having received the money for that purpose, the promise is good, and not within the Statute of Frauds, or obnoxious to public policy. *Bohannon vs. Jones*..... 488
2. No contract for the sale of goods for the price of ten pounds sterling and upwards, is valid under the 17th section of the Statute of Frauds, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or some note in writing be made of said bargain, signed by the parties to be charged by such contract, or their agents thereto lawfully authorized.
Denmead vs. Glass, Laws, & Co. 637
3. A delivery of goods to the railroad is not a delivery to the purchaser, in the purview of the 17th section of the Statute of Frauds; the railroad not being the agent of the buyer to "receive and accept" the same. *Ibid.*
4. The Act of 1852, *Pamphlet*, p. 243, dispensing with the consideration, being stated in the written agreement to answer for the debt, default or miscarriage of another, is not repealed by the Act of 1856, *Pamphlet*, p. 260. The latter Act repealed the Act of 1854, *Pamphlet*, p. 58, declaring that the Statute of Frauds and Perjuries should not operate in cases where there has been a performance of the agreement in whole or in part. *Sorrell vs. Jackson*..... 901

FRAUDULENT ASSIGNMENTS.

See Debtor and Creditor, 2.

GARNISHMENT.

1. Process of Garnishment must be issued by a magistrate who is qualified to issue an Attachment, and such process issued by any other person is void, and cannot be the foundation of a valid Judgment. *Stephenson vs. Campbell*.... 159
2. When the creditor states in his affidavit under the Garnishment Act, "That he has commenced his action of complaint in the Superior Court of Dougherty county, against Thomas A. Janes, his debtor, and that he has reason to apprehend the loss of said sum, (\$732 in account,) or some part thereof, unless summons of garnishment do issue," it sufficiently identifies the case in which the process is sued out. *Janes vs. Tomlinson*..... 540

garnishment bond is amendable under the Act of 1856, as to conform to the Law. *Ibid.*

When a case is reached against a garnishee who has not answered, he is entitled to be called; and if he then appear and depose, it is in time. And were it otherwise, if the plaintiff enters up judgment against the garnishee for the amount admitted in his return, that will amount to a cover of the irregularity.

Wall et al. vs. Shippard & Chambliss..... 928

et Jurisdiction, 4.

GIFT.

W., a parent, intending to divide and give off his negroes, made an allotment, in which certain negroes fell to the share of his son, J. M. W.; the negroes were not present, J. W. said to his son, that he might send for the negroes when convenient, but retained the possession, and never delivered them to J. M. W., but he subsequently conveyed the negroes by deed to one in trust for the children of J. M. W. The negroes were subsequently levied on under executions against J. M. W., and were claimed by the trustee: *Held*, That the gift was not complete in J. M. W. want of delivery, and that they were not subject to the payment of his debts. *Carswell vs. Ware et al.*..... 267

GUARRANTOR.

Good faith to a guarantor requires that the funds of the guarantor should be applied to his own debts, and not to debts which he is not bound, and if the guarantee accepts of a misapplication of funds for his own benefit, the guarantor may treat the wrong application as a nullity, and do where he would do if the right one had been made. *et vs. Webster & Palmes*..... 802

HANDWRITING.

evidence, 18.

HIRING.

Contracts, 3, 4.

HOTCHPOT.

See Advancements, 1.

HUSBAND AND WIFE.

1. The wife is *sui juris* as to a suit for divorce, and may charge the husband without his consent with the real value of all such services of other persons as may be necessary to her in the conduct of the suit. *Sprayberry vs. Merk*..... 81
2. O. permits his wife to sell cakes, &c., on her own account, from the earnings of which she buys a negro, taking the title in her own name, by his consent. She keeps and holds the negro as her separate property, paying the taxes all the time: *Held*, that the negro vested in the wife as her separate property against her husband, and one claiming under him as a volunteer. *Oglesby & wife vs. Hall*..... 386

See Criminal Conversation; Divorce; Marriage; Marriage Settlements; Witnesses, 1.

ILLEGAL CONTRACTS.

See Equity, 15, 16, 18.

INJUNCTION.

See Costs; Equity, 2.

INSOLVENT DEBTORS.

1. The penalty imposed by our Statute for arresting a debtor, after he has been discharged from imprisonment under our laws in favor of insolvent debtors, applies only to arrests under process from this State, and not to arrests under process from another State, and within another State. *Morgan vs. Ely et al*..... 76

See Damages, 3.

INTEREST.

See Administrators, 1.

JAIL FEES.

he Justices of the Inferior Court have power, on application to them by a defendant in *ca. sa.* who is in jail, to order his discharge, when it appears that the plaintiff in *ca.* has failed to give security for the weekly payment of jail fees; and to order the discharge without any notice to the plaintiff in *ca. sa.*, except where the defendant has gone to jail after being surrendered by sureties.

Johnson, Dickinson & Co. vs. Carhart, Bro. & Co...... 917

JUDGMENT.

... owes C. a balance, both residing in Georgia. M. goes to South Carolina, and is summoned by process of garnishment, at the instance of W. & W., creditors of C., to depose what he is indebted to C. M. answers, and admits indebtedness, which he is directed by the Carolina Court to pay over to the hands of an assignee. M. is garnisheed in Georgia by S. F. & Co. to depose in the Courts of this State what he is indebted to C. He answers, and brings to the knowledge of the Court the fact of the South Carolina judgment against him for the same debt: *Held*, that it is error to coerce M. to pay over the money a second time in this State, and that he was protected by the South Carolina judgment from further liability.

Sydney vs. Seymour, Fanning & Co...... 440

... who buys land that is, at the time, under levy, as the property of a third person, whether he in fact had notice of such judgment, execution and levy at the time or not, is not to be protected against the lien of such judgment and execution as an innocent purchaser.

Steberry vs. Weaver...... 534

... one is indebted, as guardian, to another, who was his ward, and turns over land or other property that is at the time subject to the lien of judgments in favor of third persons, in payment of what he owes his ward, as guardian, and afterwards dies, the land still continues subject to the lien and is not protected from levy and sale under the Statute of 18th February, 1799, "For the protection and security of orphans and their estates." *Ibid.*

Evidence, 30; *Possessory Warrants*, 3, 4; *Roads*.

JURISDICTION.

1. A claim, above the jurisdiction of a Justice's Court, may be reduced by payments, so as to be sued in such Court.
Nichols vs. McAbee 8
2. All persons found within the limits of a Government, whether their residence be deemed permanent or temporary, are to be deemed, so far, citizens or subjects thereof, as that the right of jurisdiction, civil and criminal, will attach to such persons. *Molyneaux vs. Seymour, Fanning & Co* . . . 440
3. Although a non-resident come not within the territorial limits of a State, still, if he own property there, that will give the Courts jurisdiction. *Ibid.*
4. If a non-resident have property in the hands of another, it may be reached by garnishment, the property itself, as well as the garnishee, being within the jurisdiction of the Court. *Ibid.*
5. Personal property has no locality other than that of the person having the same in possession, ownership, custody or control. *Ibid.*

JURORS.

1. A Juror cannot impeach his own verdict.
McElven vs. The State 869

JURY.

See Criminal Law, 6, 15.

JUSTICE'S COURTS.

1. A claim, exceeding the amount over which a Justice's Court has jurisdiction, may be brought within the jurisdiction, by payments which reduce it to that amount.
Nichols vs. McAbee 8
2. When so reduced, it is within the Statute which allows a plaintiff in Justices' Courts (under certain circumstances) to prove his account by his own oath. *Ibid.*
3. An appeal thus entered upon the Minutes of the Justice's

court is sufficient: "I stand security on the appeal of the above stated case," the case being stated and the name of the party signed thereto. *Shirley vs. Price et al.*..... 328

It is proper, if not positively required by the true construction of the Act of 1811, that parties in the Justice's court should testify orally when proving their accounts by their own oaths, and be subject to cross-examination by their adversary. *Ibid.*

LEGISLATIVE POWER.

See Taxes.

LETTERS OF CREDIT.

See Contracts, 9.

LIEN.

The Act requiring certain liens to be enforced within twelve months, is not affected by the subsequent Statute, beginning the first of January, of the year ensuing, as the time when open accounts shall bear interest, and also from which Statute of Limitations shall begin to run. *Winning & Tuttle vs. Stovall et al.*..... 444

A proceeding instituted against the proper parties to enforce a mechanic's lien may be converted into a regular suit to recover the price of the work done and the materials used. *Ibid.*

A lien given for negro hire, for negroes employed in steamboats and other water craft, on certain Rivers in this State, does not extend to the Savannah River. *Mcpatrick et al. vs. Bank of Augusta et al.*..... 465

The Act of 1847, (*Cobb*, 557) liens against steamboats may be enforced by the creditor, his attorney or agent; and the same act, a demand made on the owner of the boat, his agent or attorney, is sufficient. *Ibid.*

A lien is given by Statute for services rendered, and materials furnished for the construction of a boat "whilst getting ready for navigation." It must be after it has actually commenced upon the navigation. *Ibid.*

6. The Statute gives a lien to "machinists" only, and not to those who merely vend machinery. *Ibid.*
7. It is sufficient, under the Act of 1847, to state, that the boat upon which the lien is claimed, has "arrived at her place of destination," without the additional words, in the language of the Act of 1841, "to which she was last freighted." *Ibid.*
8. The lien given by these various Acts, takes date from the judgment.
To invest a vessel with a character of nationality, it is necessary that it be entered at the Custom-House, and in a contest between foreign creditors of said vessel, or a foreign creditor and our own citizens, no lien, under our State Laws would be available, unless the same be recorded or registered as required by the Act of Congress, in the office of the Collector of Customs. But a failure to do this will not displace a lien already acquired under our own Laws, in a contest between our own citizens. *Ibid.*
9. The Act gives a lien for "wood and provisions"—not for "supplies"—furnished steamboats.
10. Where an individual or a company own several boats, the lien provided by Law for wood, provisions, &c., is not restricted to any one boat, but covers the whole, and the judgment may be entered up against all, provided all have reached their point of destination, or as they severally arrive there. But if entered against one or more only, it is restricted to the money arising from the sale of the boat or boats against which the judgment is entered. *Ibid.*
11. The order of the Judge of the Superior Court, (before whom the application and affidavit is made,) to the Clerk to issue execution for the sum sworn to, with costs, in favor of the applicant against a steamboat and owners, which order is signed by him officially, is a substantial compliance with the requirements of the Act of December 7th, 1841, "That the Judge or Justice shall grant an order to the Clerk to enter up judgment."
Klink, Adm'r vs. Steamer Cussota & Owners..... 504
12. Had the proceedings been illegal on this account, they could have been cured by an order *nunc pro tunc*, so as to proceed at once with the trial, the rights of third persons not having intervened. *Ibid.*

A plasterer is not entitled to the lien for his work, materials furnished, &c., given to masons and carpenters by the Act of 22d Dec., 1834, and made general by the Act of December, 1838. *Fox vs. Rucker*..... 525

See *Judgments*, 2, 3.

LIMITATIONS OF ACTIONS.

A payment by the principal or maker of a promissory note, before barred by the Statute, does not constitute a new point for the running of the Statute of Limitations against the indorser or surety, unless such indorser or surety be a party to such payment.
Unter vs. Robertson & Robertson..... 479

W. receives negroes of B. as a loan, and he subsequently sets up title to the property, the Statute does not begin to run in his favor until the fact of his adverse claim is made known to B. *Weathers vs. Barksdale*..... 888

The Statute of Limitations does not begin to run in favor of one occupying land, so long as he disclaims ownership. In such case, he holds in subordination to the title of the true owner. *Roe & Hays vs. Doe, ex. dem. Morrison*.....

LIMITATION OF ESTATES.

Elizabeth Tankersly, by a deed of gift, gave to her son, William F. Jackson, certain negroes, at the death of the said William F. to be equally divided among the heirs of the body of the said William F. Matilda, a daughter of the said life tenant, married one Sharman and died, leaving children and her husband surviving her in the life of her father: *Held*, 1st. That the words heirs of the body do not create an estate tail in the life-tenant. 2d. That the person who should answer that description at the death of William F. Jackson, took the estate as purchasers and not by descent; that their interest during the life-estate was contingent, and not vested. 3d. That in the distribution, the children of Matilda take *per stirpes* and not *per capita*.
Man vs. Jackson..... 224

ator, by one clause in his Will, provides: "Respecting the tract of land called the Tanyard, it is my will that the same be equally divided between my heirs, hereafter named,

but that they shall not have it in their power to dispose of or sell any of their shares for twenty years;" and by another: "It is my will that whatever part or share of my estate, either real or personal, which shall come to either of my daughters, hereafter named, the same shall not be liable, under the control, or subject to any debt or debts of any husband they may intermarry with; that before any such intermarriage shall take place, the portion of my estate which they shall inherit shall be settled on trustees for their sole and only use, and to be disposed of by my said daughters as they may think proper:" *Held*, That these provisions do not vest or give an unlimited power of disposition, but only of such interest as they take under the other clauses of the Will.

Doe, ex dem. Sheftall et al. vs. Roe & Roberts..... 453

3. That if a testator gives, in one clause of his Will, an absolute estate, and in a subsequent clause cuts down such estate to a less interest, the prior gift is restricted accordingly. *Ibid*.

4. L. S., by his Will, provided: "In case of the death of either of my children, to-wit: B., H., J., M., E., S., A., or A., before the division takes place, or after, without issue legally begotten, then, and in that case, the portion of him or them so deceased shall be only inherited and divided between my heirs, the survivor or survivors of my eight children, heretofore named. In case of my sons or daughters should intermarry and die, leaving issue legally begotten, they shall not inherit their father's or mother's portion of my estate before they attain the age of eighteen years, and in case of the death before they attain that age, the property of the father or mother so deceased shall return to the children: I mean the eight so often mentioned:" *Held*, That the limitation was not void for remoteness, but that the devise was limited to take effect on a definite failure of issue. *Ibid*.

5. By the Will of the late Governor Troup, he directed that his executors keep his property together for three years, giving to the heirs in the meantime a decent and becoming support. "At the expiration of three years, and on the first day of January next thereafter, he desired that all of the property of which he died possessed with, the increments both real and personal, be divided as nearly as possible into three equal shares. I mean specifically, one share

for the children of Florida, one share for Oralie, and one share for George M. Troup, who are to have and to hold the same to them respectively, their heirs and assigns forever with these exceptions, viz: If Oralie should die without legal lineal heir or heirs, then shall her share go to the children of Florida, to be equally divided among them, or be survivors; and if George should die without legal heir or heirs, then shall his share descend to the children of Florida likewise, or the survivors:" *Held*, That upon the death of George M. Troup, without legal lineal heir or heirs, the one-third share of his father's estate bequeathed to him, vested in the children of Florida, his sister.

Norman et al. vs. Troup et al...... 496

An estate to one during her life, and after her death to be equally divided between the heirs of her body, is not an estate tail, but an estate for life, with remainder to the children of the first taker. *Herring et al. vs. Rogers et al.*..... 615

An estate to one generally, without expressing what estate, and then adding, that if he shall die without children, then forever, is not an estate tail, and the limitation over is valid. *Morton vs. Black*..... 636

When the direction is, that all the property which shall be undivided and remaining at the death of the first taker, shall go over, the description of what goes over is sufficiently certain. *Ibid.*

When a testator directs his property to be divided between his wife and children, and then directs that the share of a child shall go over to the survivors, if such child shall die before arriving at age or without issue, there is no estate tail, and the limitations over are valid. *Annell, Adm'r, vs. Ford et al.*..... 707

In such case, "or" will be construed "and," and the share of a child will not go over after he arrives at age, though he dies without issue. *Ibid.*

LOST PAPERS.

When an original paper is sued and declared on as the act of the maker thereof, and he does not deny it on oath, but confesses judgment, and afterwards, while the case is on the

appeal, such paper be destroyed, in the absence of a plea of *non est factum*, and the proof of such fact and the contents, plaintiff is entitled to recover on the same, without further proof of its execution. *Linsay vs. Kendrick & Co.*..... 545

2. A party is not obliged to establish a lost paper under the Judiciary Act, but may recover upon proof of its contents as a lost paper. *Ibid.*

3. Where a case is to be transferred from an old county to a new one, lost Court papers in the case must be established before the transfer, in the old county, and until the Court papers have been turned over to the new county, there can be no prosecution of the case there, nor default in failing to prosecute it there.

McDougald vs. Maitland, Kennedy & Co. 703

MALICIOUS MISCHIEF.

See Criminal Law, 5.

MALICIOUS PROSECUTION.

1. To authorize a recovery for malicious prosecution in a civil proceeding, the plaintiff must show affirmatively that the proceedings were malicious and without probable cause, both concurring. *Cook vs. Walker*..... 519

MANSLAUGHTER.

See Criminal Law, 3, 4.

MANUMISSION OF SLAVES.

1. The evil which our Statutes against manumission were intended to prevent is not a reduction of the number of slaves, but an increase of the free negroes within the State—hence, an instrument providing for manumission outside of the State is not within the Statutes. *Myrick vs. Vineburgh*.... 161
2. Testator, by the 2d item of his Will, says: "I give my servants, John, a man, and Betsy, a woman of yellow complexion, to my executors hereinafter named, in trust to convey said negroes immediately after my death to some one of the non-slaveholding States of this Union, as the said executor may select, or to whomsoever said servants may elect for a

master in this State before John T. Stephens:" *Held*, To be in conflict with the Act of 1818 against manumission, and void. *Curry et al. vs. Curry et al.*..... 253

All conveyances and contrivances for carrying a slave out of Georgia and bringing him back as a free man, to be added to the free-negro population of the State, are void; and the status of the negro remains just what it was before the first step in the process was taken. *Hammond vs. Candler*. 275

MARRIAGE.

Notwithstanding the Statute directs a License to issue in case of Marriage, and inflicts a penalty upon any minister of the Gospel or magistrate who performs the ceremony without such license, yet, in the absence of any positive enactment declaring that all marriages not celebrated in the forms prescribed shall be void, a marriage deliberately and intentionally entered into—*per verbi de presenti*—that is "I take you to be my wife," and "I take you to be my husband"—by parties able to contract, is to all intents and purposes a valid marriage, notwithstanding the parties have failed to comply with the Statutory provisions. *Kew vs. Dupree*..... 173

MARRIAGE SETTLEMENT.

A marriage settlement which provides, that the wife's property and its proceeds shall "never" be subject to the control nor the contracts of the husband, seems to intend his exclusion after the death of the wife, as well as during her life, but it may be submitted to a Jury to be construed in the light of the circumstances which surround the parties at the time of the marriage. *Mason et al. vs. Deese*..... 308

One W. H. L. being in treaty of marriage agreement with his intended wife, agreed with her in parol, that the property he should receive by her on the marriage, he should give to her and the children of their marriage by will; after the marriage prepared a Will according to that agreement, and kept it by him for that purpose; subsequently executed such Will, and immediately afterwards, by codicil, so changed the disposition of that property as to give wife only a life estate in the property: *Held*, That upon execution of the Will, the agreement was executed, and excluded him from making any subsequent disposition, codicil, or otherwise, that would defeat the agreement, it must be enforced. *Lowe vs. Bryant, Adm'r*..... 528

MARRIED WOMEN.

1. A married woman may dismiss her bill in Chancery relative to her separate estate, against the wish of her *prochein amy*. *Brawner vs. Bell*..... 334
2. A married woman, who is next of kin to the deceased, is not conoluded by the probate of the Will in solemn form, where her husband only was notified.
Stone et al. vs. Green et al...... 340

MASTER AND SERVANT.

See Overseers; Railroads, 9.

MISTAKE.

See Equity, 10.

MORTGAGE.

1. Against a proceeding of foreclosure on personal property, the mortgager may *at Law* go into the consideration of the mortgage, or rely by way of defense upon any fact or principle of Law which would entitle him to relief in a Court of Equity. *Mell vs. Mooney*..... 413
2. A mortgage given to the Bank of Augusta was foreclosed upon the affidavit of John Bones, as President of the Bank of Augusta, instead of as President of the corporation, viz: "The President, Directors and Company of the Bank of Augusta." *Held*, That the irregularity, if it be such, was not material.
Kirkpatrick et al. vs. Bank of Augusta et al...... 465
3. Where two give a lien on their separate interest in the same property to a common creditor, the mortgage may be foreclosed separately against each. *Baker vs. Shephard et al.* 706
4. A claimant against a mortgage *fi. fa.* cannot take advantage of the fact, that the mortgage was foreclosed within twelve months from the granting of letters of administration upon the estate of the deceased mortgager. *Ibid.*

See Purchaser.

NEWLY DISCOVERED EVIDENCE.

See New Trial, 9.

NEW TRIAL.

new trial must be granted, when the verdict is contrary to Law and evidence, notwithstanding there have been two concurrent verdicts of the Jury.
Justices of Monroe Female University vs. Broadfield et al... 1

new trial will be granted, where the Court refuses a continuance in a capital case, on account of the absence of testimony, material for the prisoner's defense.
Hiltworth vs. The State..... 10

when a legal charge is requested upon the main point in a case, and it is unintentionally omitted by the Judge, a new trial ought to be granted, although the charge was not again suggested by counsel when called on at the end of the charge to suggest omitted points. *Adair et al. vs. Adair*... 102

on an issue of fraud, where the Court and Jury who tried the case have passed upon it, and this Court is satisfied with the result, a new trial will not be awarded.
Annell vs. Culpepper & Boon..... 107

new trial will not be granted on the ground that the verdict is contrary to evidence whenever there is sufficient evidence to support the verdict. *Worthan vs. Brewster*..... 112

new trial will be granted when the verdict is contrary to the evidence. *May vs. Dorsett*..... 116

new trial will be granted where the charge of the Court is calculated to prevent the Jury from giving proper consideration to any portion of the evidence, to the injury of the party complaining of the charge.
Mass & Blalock vs. Cook..... 138

new trial will not be granted when the verdict is not contrary to law, contrary to the evidence, or strongly and decidedly against the weight of evidence.
Inner vs. The State..... 137

new trial will not be granted on the ground of newly discovered evidence, when there is no affidavit from prisoner

or his counsel that such evidence was unknown to them during the trial, especially when the witness by whom this newly discovered evidence is expected to be proven was sworn and examined on the trial in the defense, and who remembers the additional facts by having his recollection subsequently refreshed. *Ibid.*

10. Notwithstanding the Court refuses to postpone a case to procure testimony which would be unobjectionable, still, if the evidence, if in, could not affect the result of the case, the judgment will not be disturbed. *Mann vs. Waters*..... 220

11. Where the issue is the capacity of the contractor to make a contract, and the evidence, to say the least of it, is as strong on one side as the other, and no rule of Law has been violated in submitting the case, and there have been two concurrent verdicts of special Juries against the contract, and the presiding Judge has refused to grant a new trial, this Court will not interpose to award a re-hearing
Davis vs. Smith..... 263

12. Under the Act of Feb. 20th, 1854, as amended and interpreted by the Act of Dec. 12th, 1859, neither the Superior nor the Supreme Courts are required to grant a new trial in any case for an immaterial error, "one not affecting the real merits of the case." *Morton vs. Pearman*..... 281

13. When the evidence is sufficient to support the finding, and the verdict is not against Law, or the charge of the Court, and there is no error in the rulings of the Court, a new trial will not be granted.
Johnson alias Thompson vs. The State..... 426

14. If error has been committed by the Judge in putting the case before the Jury, he ought to grant a new hearing, when there was evidence enough to support a different verdict. *Foster vs. Jenkins & Belt*..... 476

15. A new trial will not be granted on account of the admission in evidence of a copy deed without proof of the correctness of the copy, and without proof of the execution of the original, when the paper is produced under notice by the party against whom it is read, and it appears from the history of the trial that he claimed under it.
Herring et al. vs. Rogers et al...... 615

16. Where the issue was one of fact only, and there is ample testimony to justify the verdict, a new trial should not be granted. *McDuffie, Adm'r, vs. Stuart & Fountain*..... 661
17. Where the judgment which is sought to be reversed gives the plaintiff in error all that he claims, it will be affirmed, without regard to any errors that may have been committed on the trial. *Kitchand et al. vs. Davis*..... 686
18. Notwithstanding legal testimony is excluded by the Court, yet, if considering it as we do, it would not change the result, it is no ground for granting a new trial.
Johnson vs. Johnson..... 857
19. If the Court be requested, in writing, to give a legal charge, and refuses upon the ground that there is no evidence to support it, when, in fact, there is evidence; it is error; and on account of which a new trial will be awarded, if the point was material in the case.
Cook vs. Wood..... 891
20. Whatever errors may have been committed, a new trial will not be granted when a different verdict, if rendered, would not be allowed to stand. *Black vs. Lewis et al.*..... 958
21. Admitting illegal testimony which is immaterial, is no ground for a new trial. *Williams vs. Hamilton*..... 968
22. Newly discovered evidence, to be a ground for a new trial must be material and pertinent. *Ibid.*
See Charge of the Court, 2, 3, 4.

NONSUIT.

1. M. gave bond to R. in the sum of \$250, conditioned, that if M. and his wife deliver possession of a lot in the city of Columbus, on 25th December, or on demand to R., provided R. shall, on like demand, at the same time deliver possession to M. and wife of another lot. On suit to enforce payment, the plaintiff failed to show on the trial the quantity of interest intended to be passed between the two in respect to the lot: *Held*, That the Court properly awarded a non-suit. *Rogers vs. Mariner et al.*..... 515

NON EST FACTUM.

1. N. McD. applied to S. McG. to become his security on a note to C. M. & Co. not naming any amount; McG. replied

by letter, authorizing McD. to sign his name to such note as security. Suit afterwards being brought on this note, McG. plead *non est factum*. On the trial of that issue, it was proper for the Court to let the note be read to the Jury on proof of a conversation between McD. and McG., in which McG. distinctly admitted writing the letter giving the authority to McD. to sign his name, &c., and, on the further admission by McG., that McD. was, by the permission and consent of McG., in the constant habit of signing McG.'s name as security for him whenever he chose to do so. *McGinnis vs. Chamberlain, Miller & Co.*..... 32

2. The Jury having returned a verdict against McG. on this proof, such verdict was not so decidedly against the weight of evidence as to require the Court to grant a new trial.

Ibid.

NUISANCES.

- 1 Any obstruction to a public street in a city, is a public nuisance. *Mayor & Council of Columbus vs. Jaques et al.*..... 506

2. A Court of Equity has jurisdiction, and will, in a proper case made by injunction, restrain a public nuisance.

Ibid.

3. The Legislature, 21st December, 1827, authorized certain commissioners to select a site and lay out an oblong square of 1,200 acres as a reservation for the common and town of Columbus, to lay out lots, with appropriate streets, alleys, squares, &c. On 16th December, 1828, the Legislature passed another Act, "That the Intendant and Commissioners shall in no wise have power to alter the plan of said City by shutting up streets or otherwise, nor to permit any dwelling-house or other buildings to be put on any of the streets or common of said town, under any lease or leases, or in any other way:" *Held*, That the Mayor and Council of the City of Columbus, under this restriction, had no power to erect, or cause to be erected, a Market-house in the streets of said city. *Ibid.*

ORDER OF SALE.

See Court of Ordinary.

OVERSEERS.

When an overseer comes to the house of his employer
runk, the employer is justifiable in refusing to turn over
into his hands his plantation and property.

Johnson vs. Gorman..... 612

If an overseer demands additional stipulations to his origi-
nal agreement, to the effect that the employer is to divest
himself of all control and authority over his negroes, the
employer is excusable for declining the engagement. *Ibid.*

If the employer, within a reasonable time, offers to allow
the overseer to enter upon his duties, and he refuses, sug-
gesting as an excuse that he has made other arrangements,
this is for the overseer to support the suggestion by proof.

Ibid.

PARTIES.

A suit being brought in the name of a Trustee who is re-
moved, his successor may be substituted upon motion, and
the cause proceed. *Cobb vs. Edmondson*..... 30

On an application for Dower, since the Act of 21st Febru-
ary, 1850, no person but the administrator of deceased, can
make a party to the proceeding for the purpose of con-
testing the right of the widow to have Dower assigned her.
Wadley vs. Lawless..... 88

The nominated executor and propounder of a Will is a le-
gal party on behalf of the legatees, to conduct the litiga-
tion involved in a caveat to the Will, from the beginning to
final adjudication. *Lucas et al. vs. Lucas*..... 191

The rule of Law is stern and well-settled, that when a plain-
tiff comes into Court, he must recover upon his own merits
and not upon the demerits of the defendant, unless where
a Statute has created an exception.
Gram vs. Mitchell..... 547

Whenever a plaintiff can make out his case, without invo-
king the illegal contract to his aid, he is entitled to recover.
Ibid.

The sale, by an Administrator, of land for which a suit is

pending against him, is no reason why an administrator *de bonis non* should not be made a party to the suit, after the death of the first administrator.

Roe & Hays vs. Doe, ex dem. Ayres et al...... 775

7. Where an executor dies pending a suit in Equity against him, in which the complainants are attempting to fix a personal liability upon him on account of an alleged *devastavit* of the estate of his testator, it is proper that his representative should be made a party to the proceeding.

Rogers vs. Rushin..... 934

See Witnesses, 11, 12.

PARTNERS AND PARTNERSHIPS.

1. Notice of the dissolution of the partnership must be given to those who have dealt with the firm, or each member of the firm will be bound by the acts of the other dealing in the name of the firm with such persons, especially when the transaction relates to the past debt of the dissolved partnership. *Ennis et al. vs. Williams et al.*..... 691

PAYMENT.

1. There should be very strong evidence to overcome the plea of payment, supported by the plaintiff's receipt in full of all notes and accounts, to its date, which is subsequent to the note sued on. *Raiguel vs. Dessure*..... 690
2. Payment to an agent, by releasing his personal debt, is no payment to the principal *Bostick vs. Hardy*..... 836
3. Money paid by the debtor or his agent, to the creditor, in discharge of a particular debt, cannot, without the consent of the debtor, be applied to any other.
Johnson vs. Johnson..... 857
4. The payee of a promissory note agreed with the maker, that if he would take up payee's note, held by a third person, it should be received as payment upon his. This the maker did. The maker's note was transferred by the payee after it fell due. *Held*, That the maker was entitled to a credit by way of payment for the note of payee, which he had taken up. *Staley vs. Matheny*..... 937

See Limitations of Actions, 1.

PENALTY.

See Consideration.

PHYSICIANS.

A physician who was practicing at the date of the Act of 1847, which revived the Act of 1825, to regulate the licensing of Physicians in this State, &c., is a qualified physician, and may collect his account for medical services.
Waddox vs. Boswell..... 38

PLASTERER.

See Lien, 12.

PLEADING.

Apparent defects in a declaration that could be cured by amendment, are not material.
Water Lot Company vs. Leonard 560

PLEDGES AND PAWNS.

Where two parties make a written contract of pawning, one advancing money and the other pledging a negro, to be redeemed at any time by payment of what the pledger may owe the pledgee, the negro can be redeemed only by the payment of all that may be due at the time of the redemption.
Below vs. Young..... 121

POSSESSION.

Adverse Possession; Ejectment, 2, 9.

POSSESSORY WARRANT.

Possession acquired under a writ of possession, that has not been superceded or suspended by an order of the Court in which it issued, is wrongful, and the person from whom such possession has been thus acquired, can have the same restored by possessory warrant.
Winton vs. Russell..... 127

In the trial of a possessory warrant, the Judge ought to award the possession to the plaintiff, if the property has

been *enticed* away from him by the defendant, or if the property having been in his recent peaceably and legally acquired possession has gone out of it *without his consent*, and has gone into the possession of the defendant without legal authority. *Mann vs. Waters*..... 207

3. The judgment on a former warrant between the same parties and covering the same property, is relevant to show that the plaintiff's former possession of which he has been deprived, was a "legally acquired one," when taken in connection with proof that the property had been delivered to him in pursuance of the judgment. *Ibid.*
4. Any limit which may have been put by such former judgment upon the *time* during which the possession was to continue, is irrelevant on this issue. *Ibid.*
5. Can a party, under the possessory warrant Act of 1821, institute proceedings to regain the possession of property which he has voluntarily placed in the custody of another? Query. *Mann vs. Waters*..... 220

PRACTICE.

1. It is within the discretionary power of the Court to allow a witness to be sworn, after the evidence on both sides has been announced closed, and the argument has been commenced; and a liberal practice in this respect is most favorable to the ends of justice. *Bigelow vs. Young*..... 121
2. But the practice of re-calling a witness to *re-state* a point in his testimony, after counsel have disputed about it in the argument in his hearing, while also under the control of a sound discretion in the Court, is one which ought to be allowed with great caution, and not at all where there is reasonable ground to suspect the *fairness* of the witness. *Ibid.*
3. A motion to set aside a verdict and reinstate the case, is equivalent to a motion for a new trial, and is a proper remedy for a mistake in the verdict. *Lucas et al. vs. Lucas*..... 191
4. A bill in Equity is filed by B., as the trustee of S. P., a married woman, for the recovery of certain negroes. On the trial, no evidence is offered showing the appointment of a trustee, or the existence of a separate estate in the married woman, neither is the husband made a party. A verdict being had for the complainant, and motion made for

new trial on these grounds: *Held*, That these objections come too late after a verdict on the merits; by not insisting on them before verdict, defendant is to be held as waiving them. *Pitts vs. Thrower*..... 212

When money is in the hands of an officer of the Court on which counsel claim a lien for fees which is controverted. the client to whom the money belongs, a Rule is a proper remedy to settle all questions between client and attorney in respect to the same. *Walker et al. vs. Floyd*..... 237

On such Rule the attorney need not attach a bill of particulars of the various services he has rendered, steps taken, things done in the different stages of the litigation in which the service was rendered, nor need he, on the trial, go into proof of the same; the services in a particular litigation must be in pleading, and proof, treated as a whole. *Id.*

Such proceeding will not lie for services not yet rendered. *Id.*

The failure to file a brief of the evidence at the time when a motion for new trial is made, is cured when the party seeking to take advantage of it has appeared and argued the motion, or has, by his own fault, caused the failure. *Madayn vs. Hightower*..... 249

A brief of the evidence be agreed upon by the counsel for the parties at the Term when the case was tried, in which it is consented that the original interrogatories and documentary evidence referred to in the brief, may be used when the brief of the evidence may be necessary, that is sufficient compliance with the rule of Court; moreover, a party so consenting cannot take advantage of the failure or omission to incorporate the written testimony into the brief. *Gauldin vs. Crawford*..... 674

A brief of the testimony be agreed upon by counsel at the Term when the case is tried, that agreement may be entered upon the Minutes at any subsequent time. *Ibid.*

On LV and LVII §§ of the Judiciary Act of 1799, as relating New Trials, expounded. *Ibid.*

The practice of withdrawing original papers from the
67

Clerk's office, which, by agreement, constitute a part of the brief of the testimony agreed upon for the purpose of applying for a new trial, condemned. *Ibid.*

13. All Courts should so administer the Law and construe the rules of practice as to secure a hearing upon the merits, if possible. *Ibid.*

PRACTICE OF SUPREME COURT.

1. Unless the Judge of the Superior Court manifestly abuses his discretion, in refusing to dissolve an injunction, this Court will not interfere, especially where it is apparent that no particular injury will accrue to the defendant by the delay, and where it is desirable that there should be first a final hearing upon the merits. *Cash et al. vs. Williams...* 20
2. The Supreme Court being a Court of review only, will not hear, in support of a plea, evidence which was not before the Court below. *Myrick vs. Vineburgh.....* 161
3. When the Court grants a new trial on the ground that the verdict is contrary to evidence, against the weight of evidence, against Law and the charge of the Court, this Court will reverse such judgment, granting the new trial whenever it appears from the record that the verdict is not contrary to evidence, nor the weight of evidence, or against Law, although it may be against the charge of the Court, the charge itself being wrong. *Pitts vs. Thrower.....* 212
4. When the bill of exceptions is ambiguous upon an important point, upon which the case turns, and no argument has been submitted by counsel, it is the safer course to remand the cause for a new hearing. *Bonner et al. vs. Andrews...* 287
5. No grounds taken in a motion for a new trial will be considered by the Supreme Court, unless it appears from the bill of exceptions that they truly recite what they state as having occurred on the trial.
Stone vs. Bancroft & Chamberlain..... 360
6. When this Court is satisfied with the general result in an Equity cause, but considers that the decree might be modified in a manner beneficial to all parties concerned, it will remand the case for this special purpose, without reopening the whole merits of the litigation.
Scott et al. vs. Winship et al..... 379

This Court will not control the discretion of the Court below in continuing an injunction after the coming in of the answer, unless such discretion has been improperly exercised. *Kervin vs. Walker*..... 906

When the question submitted to the Jury is one of fact only, the Court will reluctantly disturb their verdict. *Lardee vs. Williams & Applewhite*..... 921

When it is difficult to tell on which side the evidence preponderates, the discretion of the Court below, granting or refusing a new trial, will not be disturbed. *Williams vs. Hamilton*..... 968

PREScription.

Where the owner of land through which a Road passes has permitted it to be used for that purpose, he keeping up gate at each end to protect his plantation, the public have thereby acquired a restricted prescriptive right; and to that extent, and with that qualification, are entitled to enjoy it. *Green vs. Bethea*..... 896

PRINCIPAL.

Criminal Law, 14.

PRINCIPAL AND AGENT.

When an agent makes a contract for his principal, but conceals the fact that he is an agent, contracting as if he were principal, the principal may at any time appear in his true character, and claim all the benefits of the contract from the other contracting party, so far as he can do so without injury to that other by the substitution of himself for his agent. *Woodruff vs. McGehee*..... 158

A signature of a sealed instrument by an agent, the principal not being present, is not binding on the principal, unless the authority of the agent be under seal. *Re vs. Ware*..... 278

Payment to an agent by releasing his personal debt, is payment to the principal. *Bostick vs. Hardy*..... 936

PROMISSORY NOTES.

1. When a promissory note, without any consideration expressed in it, is changed by the holder by stating a certain tract of land as the consideration, the alteration is a material one, and vitiates the whole note.
Low vs. Argrove & Wife et al...... 129
2. The fact of the execution of a note has nothing peculiar about it to save it from the operation of the general rule in Equity, that the answer, when responsive to the bill, can be overcome only by two witnesses, or one witness aided by corroborating circumstances. *Ibid.*
3. Where a negotiable note is transferred as collateral security after maturity, the legal title is vested in the holder, and a set-off against the payee, is inadmissible as a defence to the action. *Wilkinson vs. Jeffers & Cothrans.*..... 153
4. The vendor's lien for the unpaid purchase money is good against the vendee, his heirs and devisees, executors and administrators, all volunteers and purchasers who had notice of the lien before paying the purchase money, and may be set up as a defence to a note given to the vendee by a purchaser of the land, where the same has been transferred as collateral security, provided the holder took it with full knowledge of all the outstanding equities between the parties. *Williams vs. Stewart.*..... 210
5. C. gives his note to H., in consideration that he is to receive two-thirds of the professional profits of the Medical firm of H. & C. H. collects one-half instead of one-third of the profits, and appropriates it to his own use. H. sues C. upon the note. *Held, That at Law*, it was competent for C. to plead as defence to the note, the excess of profits received by H., and have the same applied as a credit upon the note.
Carter et al. vs. Christie,..... 813

PUBLIC USE.

1. The owner of land is entitled to just compensation before it can be taken for public use; if he see fit to waive his right and sue for the value of the property thus seized and appropriated, he can do so.
Mayor & Council of Rome vs. Perkins,..... 154

PURCHASER.

1. D. owes S. a debt upon his security. D. gives S. a mortgage on three negroes as further security for the debt. C., ignorant of the mortgage lien, buys the three negroes of D. at a full price. S., the creditor, with a knowledge of the sale, gives indulgence to D. from year to year, for three years, until D., who was solvent at the time the mortgage matured, had become insolvent when it was foreclosed. S. attempts to enforce the lien for his debt against the mortgaged property. *Held*, That C. is entitled to be protected in his purchase, against the mortgage lien.

Cleckley vs. Hull et al.,..... 838

See Warranty 3.

RAIL ROADS.

1. A Railroad Company is liable only for such damages as result from its mismanagement, neglect, or the want of due care and attention. And it is necessary for the plaintiff to show some act that will cast the burden of proof on such Railroad Company. The fact that a negro is run over and injured while being transported by the Road as a passenger, is not sufficient for that purpose.

Mitchell vs. Western & Atlantic Railroad,..... 22

2. The liability of a Railroad for injuries to slaves in their transportation, is to be measured by the law applicable to passengers, rather than by that applicable to the carriage of common goods. *Ibid.*
3. Less care and caution is necessary by the employees of a Railroad, when stopping for wood and water only, than when stopping to take on or put off passengers. *Ibid.*
4. The fact that the Superintendent of the Road is on the train, and in the same car where the negro injured was seated, is not even a circumstance to charge the Road for injuries received by the negro at that time. *Ibid.*
5. If the train stop at a wood and water station, and start again in an unusually short time, or with unusual speed, or without blowing the signal whistle at all, or sufficiently long before starting to put persons on their guard, and an injury happens at the time to a slave passenger, any one of these facts

will be sufficient evidence of neglect or mismanagement, to charge the Road for all damages received at the time by such negro. *Ibid.*

6. It would seem, that where the land of a citizen is taken to build a Railroad against his will, he should be paid its value, in coin, according to quality, form, and location. But if the owner sets up a claim for apprehended evils and inconveniences, the incidental benefits which he receives from the location of the Road upon his property, should be allowed by way of reduction of the damages so claimed.
Jones vs. The Wills Valley Railroad Company,..... 43
7. The case of *The State vs. Dean*, 9th Geo. Rep., 400, and of *Armstrong vs. The Oglethorpe Bridge and Turnpike Co.*, 18th Geo. Rep., 607, reaffirmed. *Ibid.*
8. Suits brought against a Railroad Company for a breach of contract, prior to 1859, had to be instituted in the county where the office for the transaction of the business of the corporation was kept.
Speer vs. Atlanta & West-Point Railroad, 135
9. The doctrine that servants of the same master cannot have redress against the master, for the consequences of each other's negligence in his service, being founded upon the policy of making each servant interested in the good conduct of the rest, cannot apply to a case where the respective situations of the servants allow no opportunity for the exertion of a mutual influence upon each other's carefulness.
Cooper vs. Mullins,..... 146

RECEIPTS.

1. A paper which merely acknowledges the reception by one person of a promissory note from another, is not a contract, and does not exclude parol evidence showing the contract under which the note passed from the one to the other.
King vs. Mitchell,..... 164

RECOUNPMENT.

1. Where the plaintiff sues in the common Counts, it is competent for the defendant to plead and prove that there was a special contract, and that by the breach thereof the plaintiff has damaged the defendant in an amount more than the plaintiff claims. *Grimes vs. Reese & Linton*,..... 339

Where the same contract lays mutual duties and obligations on the two parties, and one seeks a remedy for a breach of duty by the second, the other may meet the demand by a claim for a breach of duty against the first. *Ibid.*

Where a plaintiff sues upon one part of a contract consisting of mutual stipulations made at the same time, and relating to the same subject-matter, the defendant may recoup his damages arising from a breach of another part in his favor by the plaintiff; and thus, whether the different parts are contained in one instrument or several, and though one part be in writing and the other in parol: *Aliter*, where the contract for the breach of which damages is claimed by the defendant, is entirely distinct and independent of the one on which the plaintiff sues. *Mell vs. Mooney*,..... 413

The doctrine of *recoupment* is but an improvement upon the old doctrine of failure of consideration. It looks through the whole contract, treating it as an entirety, and regarding the things done and stipulated to be done on each side, as the consideration for the things done and stipulated to be done on the other; and when a plaintiff seeks redress for the breach of the stipulations in his favor, it *sums up* the grievances on each side, strikes a balance, and gives him a judgment for only such *difference* as may be found in his favor. *Lufburrow vs. Henderson*,..... 482

See Contracts 7.

RENT.

A. owns land that is in the occupancy of B., the Law will imply a liability on the part of B. to pay rent for the land; but no such presumption can arise where B. expressly disclaims holding possession under A. *Jackson & Brothers vs. Mowry*,..... 143

RIOT.

A riot cannot be committed without at least two persons acting in execution of a common intent. *Prince & Stafford vs. The State*,..... 27

ROADS.

A judgment ordering a road to be opened, rendered on the report of reviewers who are not sworn, is erroneous. *Smith vs. Justices of Inferior Court*,..... 728
See Prescription.

SECONDARY EVIDENCE.

See Evidence 17.

SEPARATE ESTATE.

See Husband & Wife 2.

SET-OFF.

1. When the defendant pleads and proves a negotiable promissory note of the plaintiff's as a set-off, the legal presumption is, that the defendant was the legal owner of such note at the commencement of the suit; and to avoid such set-off, it is necessary for the plaintiff to show affirmatively that he was not, in fact, the legal holder at that time. It is not sufficient to show that the defendant had previously transferred such note to third persons. *May vs. Dorsett*,..... 116
2. Where a negotiable note is transferred as collateral security after maturity, a set-off against the payee is not admissible as a defence in an action in favor of the holder of the note. *Wilkinson vs. Jeffers & Cothrans*,..... 153
3. Unliquidated damages cannot be pleaded as a set-off. *Grimes vs. Reese & Linton*,..... 330

SHERIFFS.

1. If a Sheriff collect money on an execution, and put it in a trunk under his bed, and it is stolen while he is asleep, he is liable to account to the plaintiff in *fi. fa.* for the loss. *Gilmore vs. Moore*,..... 628
2. When the Sheriff alleges as an excuse for not making the money on executions placed in his hands for collection, that the defendants notified him of their intention to file a bill to enjoin the executions, and he thought the bill would be sanctioned—such showing is not a good excuse. The Sheriff is in contempt, and the Rule is properly made absolute against him. *Dawson et al. vs. Merchants' & Planters' Bank* 664
3. If a Sheriff permit a negro, he has in possession under levy, to go at large, and such negro escapes, the Sheriff cannot reimburse himself for the costs and expenses of recaption out of the sale. *Gill vs. Wilkinson*,..... 760

4. A Sheriff holding several *fi. fas.* against the same defendant, is not excused by a claim interposed against one of them, from proceeding with the rest.

Brown vs. McCrary,..... 878

See Action 7.

SHERIFF'S SALE.

1. When land is levied on by the Sheriff under executions that are subsisting liens and unpaid liens against the land, and is fairly and legally sold, and bid off by three persons jointly, such sale is not affected by the previous fraudulent conduct of one of them in obtaining a note against a debtor, suing out attachment and levying the same on the land, especially when the land is not sold under such attachment, nor by the procurement or contrivance of the one of the purchasers who sued out the fraudulent attachment.

Buckner vs. Chambliss..... 652

2. When three persons buy land on joint account at Sheriff's sale, their agreement to do so, and not to bid against each other, does not vitiate the sale. *Ibid.*

3. When land is fairly sold by the Sheriff, under subsisting executions, and the purchasers at the sale pay up all of the liens, or all that the Sheriff requires, and give their note to the Sheriff for the balance, and the Sheriff executes a deed to the premises, the non-payment of the balance of the bid will not vacate the title. The Sheriff takes the note at his peril. *Ibid.*

SHOOTING AT ANOTHER.

See Criminal Law, 11.

SERVICE.

1. The Sheriff made the following return upon the declaration: "Served a copy of the within writ by leaving the same at the most notorious place of abode of Walter T. Colquitt, the President of the Water Lot Company." *Held*, That it was a good service upon the Company.

Water Lot Company vs. Bank of Brunswick..... 685

SLAVES.

1. A slave cannot acquire freedom in Georgia by lapse of time.
Hammond vs. Candler..... 275

See Action 2 ; Evidence 11 ; Manumission of Slaves ; Railroads 2.

SPECIFIC PERFORMANCE.

See Equity 6, 8.

STEAMBOATS.

See Liens 2 to 20.

SURETIES.

1. If a plaintiff in a *fi. fa.* take a new note for his judgment debt, with security, undertaking to deliver the original execution to the securities for their indemnity, and fail to do it, and who, in consequence thereof, lose the money, they are entitled to their discharge. *Jones et al. vs. Kerr & Hope* 98
2. Whenever the holder of a promissory note, signed by a principal and surety, extends the time of payment to the principal, without the concurrence of the surety, for the purpose of avoiding a defence to the note which is claimed by the principal, the surety is discharged from all liability on the note *Worthan vs. Brewster* 112
3. The surety is not discharged by any such indulgence of the principal as is not granted for a valuable consideration.
Goodwyn vs. Hightower..... 249
4. A surety is not a competent witness against this co-surety on an issue of *non est factum*. *Rowe vs. Ware*..... 278
5. If the payee of a note, to induce one to become a security thereon, represents that he has in his hands funds belonging to the principal, which shall be applied as a credit upon the note, the security may give parol evidence of the payee's promise; and if established by the proof, he is entitled to the benefit of said assurance. *Matthewson et al. vs. Jones*.. 306
6. The appearance of a principal in a *ca. sa.* bond at the Term

when he is bound to appear, is a discharge of his sureties
Bell et al. vs. Rawson et al...... 712

After a defendant in *ca. sa.* has given bond, his rearrest under the *ca. sa.* at the instance of the plaintiff, is a discharge of the sureties. *Ibid.*

TAVERN AND RETAIL LICENSE.

The Act of 1809, "to regulate the rates of Tavern Licenses in this State, has relation only to the prices of licenses, and leaves the power of granting licenses just where it had before been placed, or might thereafter be placed, by law. *Sanders vs. The Town Commissioners of Butler*..... 617

The Courts will not infer that the Legislature intends to authorize a local departure from a general policy of the State, unless the local exception is expressed in specific terms. *Ibid.*

TAXES.

The Legislature has the power to create corporations for the government of towns, and to enlarge or diminish their powers from time to time, at its discretion; it may authorize the imposition of taxes to construct a railroad, beginning at the city and extending into the interior—either into the interior of Georgia or an adjacent State.

The Legislature, in 1858, passed an Act to make valid and binding the subscriptions theretofore made by the Mayor and Council of the City of Columbus to the stock of the Mobile & Girard Railroad Company, and to the stock of the Montgomery & West-Point Railroad Company; and to make valid and binding the bonds issued by the Mayor and Council to said Company in payment of the same; and to declare and make valid the ordinances theretofore passed by said Mayor and Council, authorizing the collection of taxes for the payment of interest accruing on said bonds; and to authorize the Mayor and Council of said city to levy and collect a tax annually, for the purpose of paying the principal and interest of said bonds; and to authorize the collection of taxes for the payment of the principal and interest of all legal contracts which have been, or may hereafter be made by said corporation. *Held*, that said legislative act gave validity to the previous proceedings of the city and its agents, whether they were otherwise valid or not.

2. That such act was not inoperative as being retroactive, unjust, or unconstitutional.
8. That the city was thereby empowered to levy and collect the taxes which they are now seeking to enforce.
Bass vs. Mayor & Council of Columbus,..... 845

TENDER.

1. If a defendant pleads a tender, and the Jury find a larger sum due, the amount of money paid into the Clerk's office by the defendant, and which he admitted to be due, may be ordered to be credited upon the judgment.
Bennett vs. Odum,..... 940

TITLE.

1. When the trustees of a *feme-covert* have acquired a statutory title to slaves, as against the husband, can that title be defeated by a sale of the property to a third person by the husband, the purchaser having no notice of the plaintiff's title? *Bonner et al. vs. Andrews*,..... 287
2. A party having two titles to property, may disclaim one and rely on the other, and after such election made, the admissions of his privies in the disclaimed title are not evidence against him. *Oliver et al. vs. Persons*,..... 391
3. When a person bargains land in this State, giving a bond for title, and dies in another State as a citizen thereof, his administrator appointed in that State can maintain suit for the purchase money in this State, and can make a valid deed to the vendee. *Carter vs. Davis*,..... 650
4. E. D., a *feme covert*, who was entitled to a life-estate in certain negroes, the remainder to her children at her death, filed a bill against the trustee for account of hire and profits, and for his removal and the appointment of a new trustee, in which a decree was rendered. Four years afterwards, the Court in which the decree was rendered, on the motion of the solicitors for E. D., in that proceeding, passed an order to amend that decree, so far as to direct the Sheriff to sell one of the trust negroes for payment of fees for services in that suit. Upon suit brought by the children of E. D., after her death, against one holding under a sale made in pursuance of that order. *Held*, That such order so passed was void as against the plaintiffs, they not being

parties to the same, having no notice thereof, and not represented either on the hearing when the order was passed, or the original bill to which it was amendatory.

Womack et al. vs. White et al...... 696

5. That the purchaser at such sale got no title thereby as against these plaintiffs, and those holding under them are in no better situation, whether they bought with or without notice. *Ibid.*

6. If one who claims title to property be present when another makes a voluntary conveyance to third persons and does not object to the making of such deed, it is a circumstance to show that such person had no title to the property conveyed, but recognized the title to be in the donor.

Cain vs. Busby et al...... 714

7. Although a party impliedly admit title to be in another, he may, notwithstanding, show that he had the title; and if he does, satisfactorily, his title will be protected against such admission. *Ibid.*

TRESPASS.

1. Loose stock are not trespassers on unenclosed lands in this State. *Macon & Western R. R. Co. vs. Lester*..... 911

TROVER.

1. Trover is an action for damages done to the right of possession, and the amount of the damages depending therefore upon the extent of the right, it is competent for the defendant to reduce the damages by showing the quantity of the plaintiff's interest. *Bigelow vs. Young*..... 121

2. The purchase of negroes belonging to the estate of a deceased person, from any body whatever, before administration is taken on the estate, amounts to a conversion by the purchaser, and authorizes the administrator, when one is afterwards appointed to recover of the purchaser, not only the negroes, but their hire from the time of the purchase.

Davis vs. Davis..... 296

3. A plaintiff in Trover cannot enforce a judgment for the value of a slave which he had in his possession at the time

of the recovery, nor for his hire during the time that he held said slave previously. In such a case, Equity would interpose and restrain the proceeding.

Walden vs. McDonald..... 542

4. When a Jury decides that a plaintiff in trover is entitled to recover, it is proper that their verdict should be for that which both parties in open Court have acknowledged to be an agreed substitute for the property, instead of for the property, itself.

Herring et al. vs. Rogers et al...... 615

5. In an action for recovery of negroes under the Act of December 27th, 1847, the Jury returned a verdict for the specific property sued for. *Held*, That the verdict in that form of action was a proper finding. *Spence vs. Holman*...

646

TRUSTS AND TRUSTEES.

1. Where one person agrees, as agent, to buy land for another as his principal, and does buy it, but takes the title in his own name, this title in his hands stands affected with a resulting trust for the benefit of the principal by operation of Law, and the case is not within the Statute of Frauds, resulting trusts being expressly excepted from the operation of the Statute. *Chastain vs. Smith et al.*.....

96

2. In a deed of marriage settlement occurs this clause, "That should said trust at any time become vacant by death or resignation of said party of the second part, (the trustee,) or any of his successors, the said Isabella M., (the wife) by writing under her hand and seal, may appoint any other person, or persons, trustee in place of said party of the second part." In another part of said deed there was this clause, that the trust property should be held by the trustee for the sole use of the wife, "separate from and wholly free of the control of her said intended husband, or any future husband, and not liable for any debt or contract of either." The trustee named resigned, and the wife appointed one McBride, who also resigned. The wife then in writing, under seal, appointed her husband as her trustee in lieu of McBride." *Held*,

1. That the deed did not exclude the wife from appointing the husband as trustee.
2. That the husband was not excluded by Law from receiving the appointment from the wife.

That the appointment of the husband in lieu of McBride, instead and in place of Garvin did not defeat the appointment.

That the appointment was good and vested the legal title of the trust property in the trustee so appointed.

Tweedy vs. Urquhart,..... 447

Where rents, issues and profits, arising from trust property, have come into the hands of the trustee, during the lifetime of the *cestui que trust*, and were unaccounted for at the time of his death, his administrator is entitled to demand an account and settlement of the trustee. *Brown vs. Ricks* 777

Where the purchase is made by a Trustee on his own account of the estate of the *cestui que trust*, although sold at public auction, it is the option of the *cestui que trust* to set aside the sale, whether *bona fide* made or not: *Provided*, the heirs make their election within a reasonable time. *Shine vs. Redwine & Wife*,..... 780

A. conveys land to B., his brother-in-law, in trust for the separate use of his wife and children. B. and his family move off, leaving A. to manage the property, who, instead of renting it out, cultivates it himself, accounting to the *cestui que trust* annually for the rent. The land is sold under a small *fi. fa.* against B. for a sum less than one year's value, and bid off to A. to whom the title is made. *Held*, that occupying the fiduciary relation which he did, and having full knowledge of the title, he cannot hold the land, but will be compelled to re-convey to the *cestui que trust*, upon being refunded the purchase money paid at Sheriff's sale, and paid his commissions for the management of the property. *Renew vs. Butler*,..... 954

VENUE.

re Railroads 8.

VERDICT.

case in which it was adjudged that the verdict was supported by the evidence. *Ware vs. Craven*,..... 35

upon an issue whether the surety had been discharged from liability on a promissory note by the act of the holder, the Jury returned the following verdict: "We, the Jury,

- find for the plaintiff sixty dollars with interest and costs of suit—releasing the security." *Held*, That the verdict was not void for uncertainty or irregularity.
Worthan vs. Brewster,..... 11:
3. A case in which it is decided that the verdict is in accordance with the evidence. *Burch vs. Wurd*,..... 140
4. A verdict will not be set aside as contrary to evidence, because it may conflict with the conclusions of a witness who drew his conclusions from the interchange of signs between himself and another person, and who testifies under a strong motive to support those conclusions. *Cooper vs. Mullins*... 146
5. A verdict contrary to evidence must be set aside.
Spicer vs. Yopp et al,..... 285
6. A verdict of a Jury, supported by the evidence and Law, will not be set aside, especially when no error of the Court is complained of. *Clayton vs. Brown*,..... 490
7. A case where the verdict was held to be supported by the evidence. *Webb vs. Fleming*,..... 808
8. A case in which it was decided that the verdict was supported by the evidence.
Stone vs. Bancroft & Chamberlain,..... 860
9. A verdict cannot be impeached by a juror who rendered it.
McElven vs. The State,..... 869
10. A verdict will not be set aside where, in a conflict of evidence, the weight of it is with the verdict.
Macon & Western Railroad Company vs. Lester, 911
11. Where the question is one of fact only, turning upon the credit of the witnesses, and there is ample testimony to support the verdict, it will not be disturbed—especially where material evidence, in the power of the defendant, has not been produced. *Bennet vs. Odum*,..... 940
12. A verdict will not be set aside as being against the evidence, when the evidence is decidedly conflicting.
Water Lot Company vs. Jones, 944
- See Ejectment 6.*

WARRANTY.

In a suit for the price of a negro sold and warranted to be sound, if the proof shows that there was unsoundness at the time of the sale, the verdict must make *some* deduction from the agreed price, whether the negro in the unsound state was worth more than the agreed price or not.

Hook vs. Stovall, Dunn & Co.,..... 418

The proper measure of damage in such a case, is the difference between the value of the property, if sound, as it was warranted to be, and its value unsound, as it actually was at the time of the sale—the agreed price being taken as the standard of sound value, and the unsound value being proportioned to it. *Ibid.*

If one, as agent for another, sell and warrant a negro as sound, and afterwards bring suit on the note given for the negro against the purchaser in his own name, he cannot be an innocent purchaser of the note, without notice of the consideration, and if the negro be unsound at the time, and afterwards die of such unsoundness, that is a good defence to that suit. *Rutherford vs. Newson*, 728

There can be no deduction from the agreed price of a negro on account of unsoundness, when the negro was sold without either a warranty or representation of soundness. *Tuckins vs. King*,..... 909

WILLS.

When a Will is prepared by one who takes a large benefit under it, it cannot be set up without strong proof that the testator understood its provisions and assented to them. *Adair et al. vs. Adair*,..... 102

A Will cannot be reformed by making additions to it, because the whole Will must be in writing *ab origine*. *Willis et al. vs. Jenkins*,..... 167

The ordinary popular and legal sense of the word "children," embraces only the first generation of offspring; and for it to be extended further, there must either be something in the context showing that a larger signification is intended, or the person using it must know that there neither is, nor can afterwards be, any person to whom the term can be applied in its appropriate sense. *Ibid.*

4. When a Will has been revoked by a subsequent Will, the revocation of the latter does not *per se* revive the former, nor can it be revived except by re-publication in writing, attested by three witnesses, or by codicil duly executed.
Harwell vs. Lively et al.,..... 315
5. Notice to the husband of an application to prove a Will in solemn form, when the wife is next of kin to deceased, is not notice to her, so as to conclude her in a subsequent application to caveat the Will. *Stone et al. vs. Green et al.*,. 340
6. A testator's acknowledgement of his signature in the presence of the subscribing witnesses is sufficient, without the signing being done in their presence. *Webb vs. Fleming*,. 803
7. It is not necessary that the subscribing witnesses should sign in the presence of each other; it is sufficient if each signs in the presence of the testator. *Ibid.*
8. An attempt to manumit a slave, avoids only that part of the Will which relates to that object. *Ibid.*

WITNESSES.

1. A husband is not a competent witness to testify in respect to the separate estate of his wife, who is a direct beneficiary of the action, although not a party to the record.
Cobb vs. Edmondson,... 36
2. One who is a bank-officer, engaged in banking, and a judge of counterfeit money, is competent to give his opinion as to the spuriousness of a bank bill, especially when he gives the facts on which such opinion is founded.
May vs. Dorsett,..... 115
3. In a suit against co-sureties, upon an issue of *non est factum* as to one of them, the others are not competent witnesses against him. *Rowe vs. Ware*,..... 273
4. A witness cannot express his opinion upon facts stated by another witness, unless he is an expert.
Hook vs. Stovall, Dunn & Co.,..... 415
5. A witness is incompetent on the score of interest, either where he will be gainer or loser by the event of the suit, or where the record can be used in his favor in another case, to which he is a party. *Molyneux vs. Collier*,..... 731

A witness testifying *ore tenus*, may be contradicted, and thus discredited by his depositions previously taken in the same case, or in a different case involving the same issues. *Ibid.*

A bond of indemnity to protect a witness against all liability, will not restore him to competency where he is disqualified on the ground of interest. *Ibid.*

Where one dies intestate, leaving his wife and daughter as sole distributees of his estate, the husband of the widow is a competent witness in a suit at the instance of the daughter against the administrator. *Shine vs. Redwine & Wife*,..... 780

The attorney of a non-resident plaintiff is an incompetent witness for his client. *Robinson et al. vs. Towns, Gov.*,..... 818

The credit of a female witness may be impeached by proving her to be a common prostitute; but, not by showing a single act of bastardy—especially at a period sufficiently remote as to have been repented of by her, and forgiven by the community. *Weathers vs. Barksdale*,..... 888

Where the party to the case is the only witness, and his testimony makes out the case of his adversary, and then states matter in rebuttal or avoidance, it is competent for the Jury, under the Act of 1857, to credit the first statement against the party, and disregard that in his favor. *Hardee vs. Williams & Applewhite*,..... 921

A party on the record who, at the trial, has no interest in the event of the suit, may be examined as a witness. *Robert vs. Boynton*,..... 939

WRIT OF ERROR.

See Bill of Exceptions 3.







